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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 631

IN THE MATTER OF

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Debtor.

ISRAEL A. ABRAMS, ET AL., ETC.,

Petitioners,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the United States:

Petitioners, Israel A. Abrams, Sol Abrams, Henrietta Chatiner and Charles J. Rosenbloom (Adjustment Mortgage Bondholders), Meyer Abrams and Bernard Shulman, constituting the law firm of Shulman, Shulman and Abrams (Counsel for said bond owners), pray the issuance of a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit,

whose judgment was rendered on May 20, 1941, and which became final by the denial of a rehearing on June 23, 1941 (121 Fed. (2) 371).

Statement of the Matter Involved.

This petition presents "questions which involve the construction and validity of a statute, and the relative powers of the I. C. C., and the U. S. District Court", which were decided and discussed in the Opinion (R. 149). These questions were considered below in construing § 77(c)(12) involving railroad reorganizations. The gist of the decision is that the I. C. C. (as an administrative agency) may judicially determine and fix allowances and disallowances of expenses and fees, and that its decision, no matter how arbitrary or capricious it was, may not be rejected by the District Courts, and is not subject to review by the Court of Appeals.

MATERIAL FACTS. The Debtor, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, was reorganized in 1928. As a result of that reorganization there was issued, in exchange of certain bonds, 20% in a Fifty-Year Mortgage Bond Issue in the amount of $106,395,096, and 80% in an Adjustment Bond Issue (junior to the Fifty-Year Mortgage) in the amount of $182,873,693 (R. 17). On June 29, 1935, the Debtor invoked the jurisdiction under § 77 by its voluntary petition which was immediately approved. It filed a Plan of Reorganization on July 1, 1935.

Petitioners, Israel A. Abrams, Sol Abrams, Henrietta Chatiner and Charles J. Rosenbloom (owners of Adjustment Mortgage Bonds) were allowed to intervene by the District Court on July 24, 1935 (R. 14), and by the Commerce Commission, on August 3, 1935 (R. 15). They were represented by Meyer Abrams and Bernard Shulman, their counsel, the other Petitioners herein.

Petitioners were active before the District Court and before the Commission. Petitioner Meyer Abrams appeared as counsel before the Commission at the hearings held on August 5, 6 and 7, 1935, and actively participated therein in the examination of witnesses and argument (R. 15). He opposed the Debtor's Plan chiefly because the railroad would have emerged from the reorganization in no better position than it was when the proceedings were invoked. His examination and argument brought out the facts that while the General Mortgage in the amount of $138,788,000 was to remain contingent as to one-third of the interest which was payable from income, if any, such interest was *cumulative and matured in ten years.* A default at the due date would wipe out both the Fifty-Year Mortgage and the Preferred Stock. The Fifty-Year Mortgage contingent for the entire interest, was also "cumulative" and matured in ten years. In the event of a default in the payment of the interest when due, the Preferred Stock (to be given in exchange of the Adjustment Mortgage Bonds) would be completely wiped out (R. 3-7). It was shown that based on the *actual earnings* of the Debtor during the years 1932, 1933 and 1934, there would be a deficiency of approximately $1,500,000 to meet the fixed interest charges under the proposed Plan. On the basis of the average actual earnings during the last three years the Road would have emerged from the reorganization with defaults in the "fixed" charges, regardless of the "contingent" interest, so that immediate foreclosure was possible which would wipe out both the Fifty-Year Mortgage and the new Preferred Stock (R. 3, 4).

At the date of these hearings petitioners were the only representatives of the class of the Adjustment Mortgage Bonds who opposed the Plan on these issues (R. 2-7). The Debtor and the Institutional Groups sponsored the Plan, relying on a prophecy or "forecast" for an increase in

revenues (R. 3). Petitioners also opposed the Plan on the ground that the Trust Deed securing the Adjustment Mortgage Bonds was to be released as a lien and the bonds were to be exchanged for Preferred Stock and the control was to be vested in the sponsors of the Plan who were to remain as the only creditors, under a Voting Trust Scheme whereby they were to select the five Voting Trustees (R. 4, 19).

The evidence also disclosed that the sponsors of the Plan had agreed in advance on the entire Plan and on the personnel of the Voting Trustees before the jurisdiction was invoked.

The same persons who sponsored the Plan as "fair, equitable and feasible" until September, 1937, thereafter confessed that the Plan was not feasible. They admitted that the "cumulative features" in the General Mortgage, as well as in the Fifty-Year Mortgage, had to be eliminated (R. 6) and they sought a continuance of further hearings for the purpose of formulating a different Plan. Further hearings were had before the Commission in September, 1937, wherein appellants participated (R. 4). An Amended Plan was filed on January 10, 1938, which eliminated some of the defects in the Debtor's Plan. Petitioners participated in the hearing before the Commission in February, 1938, on the Amended Plan (R. 8). Petitioners' counsel urged that the Commission should formulate a Plan of its own (R. 5).

The Examiner for the Commission rendered his report, to which petitioners and other creditors filed objections (R. 16-17). The objections were sustained and on February 12, 1940 the Commission adopted a Plan of its own (R. 44). It fixed the capital structure at $548,533,321 and dispensed with the Voting Trust. The Adjustment Mortgage Bondholders were to receive common stock under the Plan.

Feeling themselves aggrieved by the Plan which rele-

gated the position of the Adjustment Mortgage Bondholders from lien creditors to common stockholders they filed objections to the Plan (R. 19). Thereafter, on June 4, 1940, the Commission filed its Supplemental Report where it reinstated the Voting Trust features but gave representation to the Adjustment Mortgage Bondholders to name one of the Trustees (239 I. C. C. p. 485). Petitioners filed further objections to the Plan with the court. Hearings were had before the court for several days, at the conclusion of which petitioners, by their counsel, participated in the oral argument and submitted briefs.*

Prior to the approval of the Plan by the District Court it ordered (R. 11) that petitions for fees and expenses be filed with the Clerk of the Court on or before May 31, 1940 and that copies of the petitions be transmitted by the Clerk to the Commission in order to fix the maximum limits under section 77 (c)(12). Petitioners filed their petition on May 25, 1940 (R. 13-22) and testified before the Commission. Such testimony, according to the opinion (R. 149) "corroborated" the statements contained in the petition. No objections were filed by any of the parties and the testimony was not contradicted. The Commission filed its report fixing the maximum limits at $312,624 (R. 71). Instead of confining itself within the limits of its jurisdiction in fixing the total maximum fees and expenses and of leaving it to the Court to determine the several allowances and disallowances of the petitioners, the Commission passed judicially on the several allowances and disallowances. It disallowed fees and expenses to different parties including the petitioners (R. 69-70) and entered its order accordingly (R. 79) allowing to petitioners "nothing" as a "maximum limit".

* Petitioners prosecuted an appeal from the approval of the plan which appeal is still pending (R. 158).

ISSUES RAISED BEFORE THE COMMISSION. Petitioners filed with the Commission a petition for rehearing or for modification (R. 81) on the grounds: (1) that the Commission was not vested with judicial power to fix and determine the several allowances and disallowances, its jurisdiction being limited to the "fixing" of the total "maximum" limits; (2) if the section be construed as authorizing it to fix the maximum individual fees and expenses the commission was nevertheless powerless to fix the "disallowance" of any fees, which is a judicial function; (3) its report was inconsistent in that while it denied compensation to petitioners on the ground that their services were not beneficial, it allowed compensation to other parties whose services were clearly not beneficial; (4) it overlooked that section 77, unlike section 77B, authorizes the allowance of expenses and fees to "parties" regardless of any benefits to the estate; (5) its finding that petitioners' services did not benefit the estate was contradicted by the record, and that its decision was arbitrary. These points were supported by a Memorandum of Law (R. 87). Points I to III were devoted to a discussion of the legal propositions (R. 87-93), and Point IV (R. 93-101) referred to the record showing that its action was capricious and arbitrary and contrary to the record. The Commission denied the rehearing on November 5, 1940 without any opinion (R. 116).

RULING OF DISTRICT COURT. Petitioners filed objections with the Court founded on the same points on which the petition for rehearing was predicated (R. 103). Objection IV pointed to the record which clearly demonstrated that petitioners performed services which benefited the estate and that the Commission's report was capricious and arbitrary (R. 110-115). The District Court did not pass on the merits of the objections but concluded that it was powerless to reject the

Commission's report, no matter how beneficial the services were to the estate and how arbitrary and capricious the Commission's action was. This is shown by the following (R. 9):

> "Mr. Abrams: I have filed objections to the report supported by a brief, and I would like to argue the objections orally.
>
> The Court: There is no need to argue the objections orally as I have read the objections and the brief and concluded that I have no jurisdiction to allow you any fees due to the report of the Commission.
>
> Mr. Abrams: Do I understand from Your Honor that your ruling is that no matter how much services I have performed and how valuable the services may be you are in no position to allow any compensation in view of the fact that the Commission's Report in fixing the maximum allowances did not allow anything to my clients for their expenses and to our firm for its fees?
>
> The Court: You can read the Statute and that is my interpretation of the Statute and an order will be made overruling your objections to the report."*

RULING OF THE SEVENTH CIRCUIT.

The opinion of the Seventh Circuit quoted the foregoing colloquy between counsel and court (R. 150-1). In justifying and in affirming the action of the District Court, it said (1) that the Commission's findings were binding on the court and (2) that the evidence upon which the finding was had was not before the District Court. A petition for rehearing was filed pointing out the misconception of the court as to the state of the record. The petition for rehearing stated:

> "The opinion states: 'The charge that the Commission, in denying appellants any relief, acted arbitrarily and capriciously, must be rejected in view of the fact found by the Commission that appellants' services were of no value to the estate. The evidence upon which

* The affirmance of the ruling of the District Court cannot be reconciled with another opinion rendered by the same court on June 6, 1941, where it reached the opposite view (*Re Chicago & Northern R. R. Co.*, 121 F. (2) p. 791.

this finding was made was not before the District Court.' This statement is based on a clear misconception of the record. The District Court stated (R. 118): 'Said petitions were submitted to the Court upon the record made and testimony taken before Homer H. Kirby, Examiner for the Interstate Commerce Commission, at Brooklyn, New York, on July 15-19, 1940, which said record and testimony were certified to this Court by said Commission and filed in this proceeding.' The District Court also said: 'The Court, having considered said petitions and the testimony before said Examiner and the entire record in these proceedings.' The stenographic report of the proceedings before the Commission, dealing with the various plans wherein appellants participated, was made a part of the record. This appears in the opinion of the court (36 Fed. Supp. 193, 200-201). * * * The opinion of the District Court also stated (36 F. Supp. 193, 197): 'It was agreed by all parties in interest that all matter of said allowance should be submitted to the court upon the record made before the Commission's examiner, without the taking of any other testimony.' ''

The petition for rehearing further stated:

''In view of this record the statement of the court in its opinion that 'the evidence upon which this finding was made was not before the District Court' is apparently an oversight. The evidence was before the District Court. However, it refused to consider the evidence because of its conception that no matter what the evidence showed, and no matter how much service appellants performed, and 'how valuable the services may be' the court was in no position to do anything about the matter in view of its construction of the statute that it was without jurisdiction to reject the Commission's report. The mere fact that the Commission found that the services were of no value did not warrant the District Court to refuse to pass upon the question whether or not this finding was arbitrary or contrary to the record.''

This petition for rehearing was denied (R. 159).

Questions Presented.

1. Does the power of Congress to deal with bankruptcy carry with it "the right to select the tribunal, even going outside of the courts, to administer debtors' estate" as held by the Seventh Circuit, or are such powers limited by Sections 1 and 2 of Article III and by the Fifth Amendment to the Federal Constitution, as contended by petitioners.

2. May an administrative body be lodged with judicial functions, to the exclusion of the courts, without the right of review no matter how capricious or arbitrary its decision may be?

3. May a reviewing court affirm a decision on the ground that the evidence was not presented to the court below and deny a rehearing when it was clearly shown by the record that such evidence was presented below?

4. Whether the Commission arbitrarily and capriciously denied the expenses and compensation to the petitioners and whether the District Court had no power to reject such finding when the records conclusively demonstrated that there was no basis for the Commission's finding.

5. Does § 77(c)(12) empower the Commission to pass on the separate allowances of the petitioners, or is the jurisdiction confined to the fixing of the total maximum expenses and leaving it to the courts to pass on the individual allowances and disallowances?

6. Whether the power to fix a maximum limit embraces a zero limit and whether the Commission exceeded the limits of its jurisdiction.

7. Does § 77 as distinguished from § 77B or Chapter X authorize compensation to parties who were allowed to intervene and who participated in the proceedings regardless of any benefits resulting to the estate.

Reasons for the Allowance of the Writ.

1. The decision in the instant case that under the bankruptcy power Congress may select administrative bodies as tribunals in lieu of the courts is not in accord with the accepted law in construing constitutional limitations on congressional power. The question presented by this petition is "not the ordinary one as to the propriety of provision for administrative determination". The question is whether Congress may substitute for constitutional courts in which the judicial power is vested, persons appointed for seven years as administrative officers, and completely oust the courts from their judicial functions. The Seventh Circuit placed such a power in Congress. Such a decision would "sap judicial power as it exists under the Federal Constitution and tends" to establish "a government of bureaucratic character alien to our system" (*Crowell* v. *Benson*, 285 U. S. 22, 57).

2. The importance of the questions involved was emphasized in the opinion of the Seventh Circuit. This is the first opinion construing § 77 (c)(12). Not only is the opinion not in harmony with the decisions of various Circuits, but it is not in harmony with another decision rendered by the same Circuit during the same term construing the same section.*

3. The decision upheld the judgment below on the ground that the evidence was not before the District Court, and, therefore, it could not have passed on the question whether the finding of the Commission was arbitrary and capricious.† The decision also held that the finding of the Commission was binding upon the court so that, regardless of the evidence, it was powerless to reject its arbitrary

* See *In re Chicago & North Western R. R. Co.*, 121 F. (2) 791, which was called to its attention by the petition for rehearing (R. 158).

† This was not a collateral attack. The objections were filed in the proceedings which contained the entire record.

report.‡ Such a decision cannot be reconciled with fundamental law, and this court will issue the writ to remove a doubt in the meaning of a statute, and to avoid anomalous encroachments on vested rights (*Duparaquet Co.* v. *Evans*, 297 U. S. 216).

4. The decision that an administrative body may arbitrarily and capriciously adjudicate the rights of the parties and that the courts are powerless to reject such a report cannot be sustained under any theory of law, and the Writ should be awarded to review such a decision.

Prayer for Relief.

WHEREFORE, the above petitioners by their counsel jointly and severally pray the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to the end that its judgment may be reversed, and for such other relief as to this court may seem meet.

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‡ This is contrary to its own decision rendered during the pendency of the petition for rehearing (*Re Chicago & North Western R. R. Co., Supra*).

BRIEF IN SUPPORT OF PETITION.

JURISDICTION INVOLVED. The jurisdiction of this court to grant the Writ is invoked under 240(a) of the Judicial Code as Amended by the Act of November 13, 1925 (42 Stat. 1938, 28 U. S. C. A. § 47). The judgment of the United States Circuit Court of Appeals was made final by the denial of a rehearing on June 23, 1941, and the petition is filed within the statutory period.

OPINION BELOW. The opinion below appears in the record at pages 148-156 and is also published in the advanced sheets of the Federal Reporter (121 F. (2) 371). The following points were decided:

1. "Under railroad reorganization * * * the Interstate Commerce Commission has power to fix the maximum for each counsel and to set the maximum so low as to deny any compensation to attorneys claiming to have rendered services in connection with reorganization."

2. "Provision of Bankruptcy Act giving Interstate Commerce Commission authority in railroad reorganization proceeding to fix maximum limits of attorney's fees to be allowed out of debtor's estate is not objectionable because of failure to give right to judicial review of ruling of the administrative body."

3. "The power of Congress to deal with bankruptcy carried with it the right to select the tribunal, even going outside of courts, to administer debtor's estate."

4. "Railroad bankruptcy act making provision for compensation for legal services in reorganization proceeding by permitting Interstate Commerce Commission to determine reasonableness and value of services violates no constitutional right."

The opinion cannot be reconciled with another opinion rendered by the same court during the pendency of the rehearing and which referred to the decision in the instant case (*Re Chicago & N. W. Ry. Co.*, 121 F. (2) 791, 798).

ARGUMENT.

I.

The Law Announced by the Seventh Circuit That Under Its Bankruptcy Powers Congress May Substitute Administrative Bodies as Tribunals in Lieu of the Courts Is Contrary to the Decisions of This Court That the Constitutional Limitations Also Apply to Congress in the Exercise of Its Bankruptcy Powers.

In justifying the action of the Commission in passing judicially on the question whether petitioners were entitled to *any* of the expenses and compensation which the District Court held it had no power to reject, *no matter how valuable the services were to the estate*, the opinion states (R. 154):

> "In the first place, the power of Congress to deal with bankruptcy carries with it the right to select the tribunal, even going outside of the courts to administer debtor's estate."

Under such a power Congress may create administrative "tribunals" to adjudicate all rights involved in the field of bankruptcy. *This is in the teeth of the decisions of this court.*

This is irreconcilable with the construction of the section by the same circuit in its opinion rendered June 6, 1941 (*Re Chicago & North Western R. R. Co., Supra*) which it considered in connection with the rehearing (R. 258). There it said:

> "Two positions are taken in respect to the powers granted by this section to the District Court. **One asserts the duty of the District Court is somewhat clerical**—entering orders approved by the I. C. C. * * * **But neither the scheme of the legislation nor the words**

> **of the statute justify the conclusion that the court was to delegate its judicial powers to the I. C. C. and merely sign the orders** that the I. C. C. advised, or approve other orders which the I. C. C. made."

The court also said:

> "In the field wherein it exercised the powers expressly given it, the findings of the I. C. C. are well-nigh conclusive. True, **it may not be said that the orders of the I. C. C. are unassailable if wholly lacking in evidentiary support.**" (Bold type supplied.)

In further construing § 77 c (12) and the distinct powers of the court and the Commission, the opinion said:

> "This express and unqualified power was conferred upon the *District Court*, and this is the most important and determinative provision of the Act so far as defining the relative powers and jurisdictions of the court and the I. C. C."

This cannot be reconciled with the opinion in the instant case.*

(a) *The Bankruptcy Power of Congress Is Subject to Constitutional Limitations.*

The power of Congress in dealing with bankruptcy is not unrestricted and is subject to the limitations of the due process clause contained in the Fifth Amendment (*Louisville Bank* v. *Radford*, 295 U. S. 555). There it was said:

> "The bankruptcy power, like other great substantive powers of Congress, is subject to the Fifth Amendment."

In its exercise of its power under the bankruptcy law, *Congress is limited by the due process clause* of the Fifth Amendment (*Kaufner* v. *Irving Trust Co.*, 299 U. S. 445).

* The opinion quoted from the Congressional Record (R 151-2) to show the scheme of the framers of the act "whereby the I. C. C., not the District Court, should fix the maximum allowance to attorneys, and within that allowance the court was to exercise its judgment". Query, what judgment could it exercise within the maximum limit of zero? The scheme (R. 152) shows no discretion was to be lodged in the courts.

There can be no due process where judgment is entered by a "tribunal" consisting of an *administrative agency. The term "case"* under Article III, section 2 of the Constitution, which vested the judicial power in the courts, *includes bankruptcy* (*Re: American State Public Service Company,* 12 Fed. Supp. 667, 678, affirmed 81 F. (2) 721, 727, C. C. A. 4, Certiorari denied 297 U. S. 724). The decision in the instant case that Congress could oust the courts from jurisdiction in bankruptcy and select administrative bodies as "tribunals" is in *conflict* with the above decisions.

(b) *The Bankruptcy Power of Congress Is Subject to the Limitations Contained in Sections 1 and 2 of Article III of the Constitution.*

To the same extent that the Fifth Amendment operates as a limitation on the power of Congress in dealing with bankruptcy not to deny due process of law, sections 1 and 2 of Article III of the Constitution also operate as a limitation on the power of Congress to substitute administrative bodies for courts as "tribunals." *There cannot be a due process of law when an administrative body is substituted for a court,* in violation of sections 1 and 2 of Article III of the Constitution. The Commission is not a court. Its members are only appointed for a seven year term. It is an administrative body not vested with judicial powers.

In *Farrell* v. *Waterman S. S. Co.,* 291 Fed. 604, the court quoted at great length from the decision of this court in *Martin* v. *Hunter,* 1 Wheat. 304, considering sections 1 and 2 of Article III of the Constitution. It pointed out that under section 1, the judicial power is vested in the courts and under section 2 the judicial power extends "to all cases in law or in equity." In the quotation from the decision of this court, this court asked "Could Con-

gress vest it (the judicial power) in any other person?" This court answered it in the negative. In *Benson* v. *Crowell,* 33 F. (2) 137, Affirmed 45 F. (2) 666, Certiorari allowed (283 U. S. 814), and affirmed (285 U. S. 22) the court quoted from another decision by this court in *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 280, the following (pp. 139):

> "That the auditing of accounts of a receiver of public money may be, in an enlarged sense, a judicial act must be admitted * * * it must be admitted that, in auditing of this account, and the ascertainment of its balance, and the issuance of this process, *was an exercise of the judicial power of the United States, the proceeding void;* for the officers who performed these acts *could exercise no part of that judicial power.* They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform any of the ministerial duties which arise out of judicial proceedings."

The court asked (p. 141):

> "Was the court to make its order without any hearing of the facts, to submit its judgment to the domination of the Deputy Commissioner because the act said to do it, if so, *would not this of itself be an unconstitutional requirement?*"

The court concluded that in order to give validity to the Act it was necessary to construe it so that the District Court *had the power and duty to hear the facts* and to determine the law in order to enter judgment from which a review could be taken. In affirming this decision this court said (285 U. S. 22 at page 56):

> "In relation to these basic facts, the question is not the ordinary ones as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. **It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions.** It is the question whether the Congress may substitute

for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner —for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, **does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system,** wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

* * *

"In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding *tribunal* is unavailing, as the contention makes the *untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence* even though a constitutional right may be involved" (Emphasis supplied.)

In *Missouri Pacific Railroad Company Reorganization* (212 I. C. C. 662) in construing section 77, the Commission said (page 665):

"As we read the statute, however, *it is the function of the court and not of this Commission to determine whether compensation for services such as were performed by the counsel for the mortgage trustees is a proper charge against the general estate of the debtor.* We proceed *on the assumption* that the judge referred the petition to this Commission for the fixing of maximum limits of reasonable compensation for the services rendered *on the assumption that the claim was*

> *properly payable out of the debtor's estate* and involved expenses in connection with the proceedings and plan, because it is only to allowances for expenses of this nature that subsection (c)(12) relates." (Italics ours.)

In *Erie Railroad Company Reorganization,* 240 I. C. C. 673, the Commission said at page 694:

> "* * * we consider that it is the function of the court, *and not our function,* to determine whether, and to what extent, such allowances constitute a proper charge against the estate of either of the debtors in this proceeding. The matter has been referred to us by the court, and our findings as to maximum limits of allowances are made pursuant to such reference."

In *New York, New Haven & Hartford Railroad Company Reorganization,* 236 I. C. C. 373, the Commission said at page 379:

> "However, *this petition has been referred to the Commission by the court for the determination of a maximum limit of allowance,* subject to the reservation hereinbefore stated, and we find that such determination is within the scope of the Commission's function under the statute. In fixing a maximum limit of allowance for the services of this petitioner, *we do not deem it to be our duty under the statute to determine whether any allowance should be made to the petitioner out of the debtor's estate.* We regard it as the *exclusive function of the court to decide the question of the propriety of any payment.*" (Italics ours.)

The decision in the instant case which justified the judicial determination of the Commission that petitioners were not entitled to any of their expenses and compensation is, therefore, in direct conflict with the decisions of this court and with the construction of the powers of the Commission as construed by the Commission. **The construction of the functions of the Commission in the other cases was binding upon it in the instant case (New York Cent. Sec. Corp. v. United States, 287 U. S. 12).**

(e) *Congress Did Not Select the Commission as a Tribunal, and It, Therefore, Had No Jurisdiction to Pass Judicial Judgment.*

Even if Congress had the power to select the Commission as the court under its bankruptcy power, *it has not seen fit to do so.* § 77 lodged the judicial power in the court. The Commission was only vested with the power to render a report to the court. *The allowance was to be made by the court and not by the Commission.* The appeal allowed by the act is not from its determination but from the order of the court. Such a review implies power and duty to pass on the facts. (*Benson* v. *Cromwell, supra,* 33 F. (2) 137.) This court has held that the functions of the Commission under section 77 are "administrative functions" and the functions of the courts are "judicial functions". (*Warner* v. *Palmer,* 312 U. S. 132.) The reasoning of the decision in justifying the acts of the Commission is, therefore, contrary to the construction of this act as given by this court. It is irreconcilable with the construction of this section in the opinion of the same court in *Re Chicago and North Western Railway Company, supra.* There it said:

> "Our conclusion is that the jurisdiction—and the exclusive jurisdiction—of all matters relating to the estate of the debtor is in the court. Also, that the I. C. C. has a most important function to perform—that of preparing the data, studying the same, and finally recommending a plan of reorganization, which must, however, be ultimately approved by the court. To give it legal effect, the court **must act judicially.**"

II.

The Power of the Commission Was Limited to a Determination of the Total Maximum Allowances and No Power was Conferred Upon It to Pass on the Individual Allowances and Disallowances.

Section 77(c)(12) provides that the court "may make allowances to the parties within such maximum limits as are fixed by the Commission."* In the instant case the Commission fixed the "maximum limits" at $312,624 (R. 71). It transcended the limits of its jurisdiction when it proceeded to make allowances to *each* of the parties and *passed on the right to any allowances* to some of the parties and determined that petitioners were not entitled to anything (R. 79).

(a) *The Intent of the Act Was to Vest in the Commission the Power to Fix the Total Burden of the Expenses.*

It was the intent of Congress to allow to the Commission the power to limit the maximum expenses or burden of the estate and to leave it to the courts to make the individual allowances. Even a court must arrive at a maximum limit

* Section 77(c)(12):
"Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c)."

that an estate will bear before it can determine separate allowances (*Irving-Austin Building Corporation,* 100 F. (2) 574, 579). It was not the intent of Congress *to strip the courts of their functions and to vest judicial duties in the administrative body.* The implication and intendments arising from the language of a Statute are a material part of it as if they had been expressed (*U. S.* v. *Sischo,* 262 U. S. 165). The legislative intent must be determined from the act as a whole (*Grier* v. *Kenna,* 64 F. (2) 605).

When the Commission arrived at its conclusion on the maximum limits and fixed it at $312,624 (R. 71) *its powers were at an end.* The subsequent acts to make the allowances and *disallowances* were wholly *foreign to its powers* and it was the duty of the court to disregard the Commission's order and to pass on the rights of the parties based on the evidence.

(b) *The Commission Recognized the Limits of Its Power as Contended by Petitioners.*

The Commission itself recognized in other cases that it had no jurisdiction to determine whether or not expenses or allowances should be made by it and *that this was a matter for the court to decide* (*Re Mo. Pacific R. Co. Reorganization, supra,* 212 I. C. C. 662, 665). In *Chicago & Eastern Illinois Railway Company Reorganization,* it determined that the term "allowances" meant different allowances during the progress of the case. There it said (212 I. C. C. 491, 493):

> "The Reconstruction Finance Corporation objects to the petition on the ground that the acts does not contemplate interim allowances, but provides for the fixing of one maximum allowance at the end of the proceeding after all services have been performed and may be appraised. But the act clearly provides that we shall *fix maximum allowances at such time or times as we may deem appropriate.*"

The opinion states (R. 153):

> "There is some support for the contention that the I. C. C.'s power was limited to fixing the maximum allowance for *all* attorneys; leaving it to the District Court to determine the amount each individual lawyer should receive, but limiting the total of all allowances, to the maximum fixed by the I. C. C."

It held, however, that the term "allowances" is contrary to the contention. It overlooked the construction of the term "allowances" made above by the Commission. It held the word "allowances" refers to allowances from time to time during the proceedings. **The commission's construction made in other cases should have been followed** (*New York Cent. Securities Corp.* v. *United States,* 287 U. S. 12).

III.

The Power to Fix Maximum Limits Does Not Embrace the Power to Fix Zero Limits.

The Commission is an administrative body and its jurisdiction is circumscribed within the limits of its power. Nothing will be inferred in favor of its jurisdiction.

(a) *The Word "Nothing" Cannot Be Stretched to "Maximum".*

Section 77(c)(12) directed the Commission to fix the "*maximum*" limits. If the opinion is correct in the interpretation that "maximum limits" means "nothing" and the District Court could not exceed the "maximum limit" of "nothing" then if carried to its *logical conclusion,* if the Commission had fixed the *total maximum fees for all parties* at "nothing", the court would be powerless to make *any* allowances. *The absurdity of such a proposition is apparent.*

(b) *"Maximum" Is Opposed to "Minimum" and "Nothing" Cannot Be Reconciled With Either.*

The Commission was *not authorized to fix the lowest amounts* but to fix *"the maximum limits"*. The Commission in the instant case fixed "zero" or "nothing" under the *guise* of "maximum" limits. The term "maximum" is defined (Webster's New International Dictionary, 1925 Ed. p. 1333) as follows:

> "The greatest quantity or value attainable in a given case; or, the greatest value attained by a quantity which first increases and then begins to decrease; the highest point or degree;—opposed to *minimum.*"

The term "nothing" is defined (p. 1472) as follows:

> "Absence of all magnitude or quantity, however small, also a cipher; a zero; * * * that which is characterized by utter absence of determination."

This is synonymous with "zero" which is defined (p. 2369):

> "A constant less than any assignable magnitude or quantity; nothing; the lowest point; nothingness; nullity."

The decision holds that the Commission "having fixed a maximum limit" at "nothing" the District Court could not make any allowance "in excess of that 'nothing' ". The opinion states (R. 153) that the commission was *"empowered and required to fix the ceiling,*—the maximum of fees on expenses". This "ceiling" cannot be reduced to the "bottom" of "nothing".

In *Croghan* v. *Savings Trust Co.*, 85 S. W. (2) 239, (Missouri, 1935), the court asked (p. 242):

> "What is nothing?"

It answered:

> "Lexicographers usually define it as naught; that which is non-existent; a non-entity. Shakespeare defines it through the mouth of Bassanio, as follows: 'Gratiano speaks an infinite deal of nothing, more than

> any man in all Venice. His reasons are two grains of wheat hid in two bushels of chaff, you shall seek all day ere you find them, and when you have them, they are not worth the search.' Merchant of Venice, Act I, Scene 1."

We would not have gone to Missouri nor would we have resorted to Shakespeare to have "*much ado about nothing*" were it not for the fact that services rendered during a period of five years were not compensated by the application of the word "nothing." If one should seek "all day" the word "nothing" in the word "maximum" his efforts will amount to nothing. The word "maximum" is the antonym of "minimum" and "nothing" is less than "minimum" and is certainly not a "maximum." The term "maximum" is defined by the Supreme Court of Illinois in *Moweaqua Coal Corp.* v. *Industrial Commission,* 360 Ill. 194, at page 200, as follows:

> "There is, so far as we are advised, neither difference in nor shades of meaning given by lexicographers and the courts to the word 'maximum.' It is universally defined to mean the highest or greatest amount, quality, value or degree. Webster's New Int. Dict.; Century Dict. 1913 ed.; 6 Oxford Dict. 1908, p. 254; Funk & Wagnalls New Standard Dict.; *Trustees of Schools* v. *Berryman, supra; In re Hanaca, supra; Poolman* v. *Langdon, supra.*"

The Commission therefore exceeded its jurisdiction and it was the duty of the District Court to reject its report. Therefore, the Seventh Circuit erred in affirming the order of the District Court.

IV.

The Commission Acted Arbitrarily and Capriciously and It Was the Duty of the Court to Examine the Evidence and To Reject Such a Report, and the Seventh Circuit Erred in Upholding Its Decision on the Ground That the Court Was Powerless To Reject the Report.

We raised the point before the Commission that the Commission's report is contrary to the evidence and that its report was *arbitrary* (R. 93-101). When the Commission denied the rehearing objections were filed in court raising this point (R. 110-115). The District Court did not overrule the objections on the ground that the evidence sustained the Commission's findings, but on the ground that *it had no right to review its findings* (R. 9).

(a) *The Denial of Compensation to the Petitioners Was Arbitrary, and It was the Duty of the District Court to Sustain the Objections and the Seventh Circuit Erred in Affirming Its Order.*

The petition for the reimbursement of expenses and for the allowance of fees was filed pursuant to the order of the District Court (R. 33-34). The petition for fees was verified (R. 13-23) and the testimony was that the *factual statements* set forth in the petition were true (R. 8). *The evidence was in no way contradicted.* The opinion states (R. 149) that the evidence *"corroborated" the statement contained in the petition.* The Commission stated (R. 70) that it was not persuaded that the evidence supports the statement that the services were beneficial to the estate.* A petition for rehearing was filed with Commission to show its error by a reference to the record (R. 81). There (pp. 93-100) it

* Petitioners were entitled to the independent judgment of the court on this issue as Section 77 (c) 12 vest the power in the court to make the allowances and this required its judicial determination of this issue (R. 9).

was pointed out (by references to the record)† that the intervenors, by their counsel, appeared before the Commission at the hearings on the Debtor's Plan at Washington, D. C. on August 5, 6 and 7, 1935, and that at that hearing *they were the only parties representing the entire class of the Adjustment Mortgage Bondholders* (as the Trustee under the bond issue was not yet a party to the proceedings). Petitioners took an active part in the hearings. They endeavored to bring out the unfairness of the plan as to this class. *They* brought out by their cross-examination (R. 3) that it was necessary under the proposed plan that *there be a net earning of at least* $7,500,000 in order to meet the fixed requirements under the plan *which was then sponsored by the Debtor and the Institutional Group* and by other parties; that based on the average actual net earnings for the previous three years *there would be a deficit of at least* $1,500,000 *per year,* so that if the plan were adopted in 1935, and if the revenue should not be greater than the average during the previous three years, *the Road would start with a default immediately.* They showed (R. 4) that the Plan was unfair as a whole for the reason that it left the various mortgages undisturbed, and the provisions under the General Mortgage fixing the definite interest for two-thirds and a contingent interest of one-third as *"cumulative"* would endanger (upon default which was then certain) the Fifty-Year Mortgage in a foreclosure which would follow. The cross-examination also developed (R. 4) that under that plan *there was a "cumulative" ten year contingent interest on the Fifty-Year Mortgage which became definite at the expiration* of ten years, and because of the insufficiency in the actual earnings *it would enable the mortgage trustee* to completely

† This record consisted of the stenographic report of the evidence before the Commission and the petition referred to the pages of such record (R. 94, 95, 96, 97, 98 and 99). This stenographic report was made a part of the record before the District Court (36 F. Supp. 193, 200-201) and was made a part of the record on review by the narrative statement (R. 2-8).

wipe out the *new preferred stock which was then offered* to the Adjustment Mortgage Bondholders in lieu of their bonds.

At the foregoing hearings, the Debtor and the Institutional Groups took the position that the Plan was fair, equitable and feasible and based their statements on their *prophetic forecasts.* Two years later when their *prophecies were shattered by actualities* they were compelled *to admit* that because of these objections the Plan could not be carried out, and they asked for a postponement and promised to remedy these defects (R. 4). They asked for an indefinite postponement without promising to present any better Plan at a definite date. Counsel for the intervenors argued the matter before the Commission and *urged the Commission to adopt a plan of its own* (R. 5). Thereafter, a new Plan was filed by the Institutional Groups which eliminated some of the objections, and the Commission *finally adopted a plan of its own.* This plan remedied the defects of the Debtor's Plan in that many of the mortgages were eliminated, the entire capital structure was *revised and the cumulative features were eliminated.* The evidence was therefore conclusive that petitioners have rendered valuable services to the estate, and they were entitled to payment for the services rendered (*Silver* v. *Scuttin Steel Co.,* 98 F. (2) 503; *Re Grocery Center, Inc.,* 83 F. (2) 617).* It was the duty of the Commission to grant the rehearing. It was the duty of the District Court to examine the record and to pass on the question whether the Commission's findings were based on the evidence.

The Act contemplates that the District Court should hear

* The respondents urged on the appeal that the evidence before the Commission was included in the record in narrative form (R. 1-8) and that the District Court did not have the benefit of the evidence in question and answer form. The narrative statement was made under Rule 75(c) for the reviewing court. This was based on the complete record in question and answer form, which was before the District Court. Such narrative statement was in compliance with the rule (*Hall* v. *Gordon,* 119 F. (2) 463) and the respondents who did not object to the statement were in no position to complain in the reviewing court.

evidence on the allowances of the fees. The approval of the order of the District Court on the ground that there was no evidence before the Court cannot be justified on any theory. The action of the trial court in denying compensation is not an absolute one. There must be some support for its conclusion (*Teasdale* v. *Safton Nat. Fibre Can Co.*, 85 F. (2) 379, 382, C. C. A. 8). An order of a court disallowing fees with a "manifest disregard of right and reason must be reversed (*Re National Dept. Stores,* 93 F. (2) 123, C. C. A. 3). That there was no right or reason for the denial is manifested by the statement of the District Court (R. 9). Neither the order of the District Court nor the order of the Seventh Circuit are reconcilable.

(b) *The Conclusion of the District Court That the Report of the Commission Was Binding Upon It No Matter How Arbitrary It Was Should Have Been Reversed by the Circuit Court.*

The act contemplates a hearing before the court on the allowances. The Commission was only vested with the power to fix the maximum limits, or, as the opinion says, "to fix the ceiling." It was not vested with the power to *fix the bottom.* The right to the allowances was a judicial function, which could only be performed by the court after hearing evidence (*Benson* v. *Cromwell,* 33 F. (2) 137). The discretion lodged in the court "must be exercised with judgment" and with "double purpose of doing equity" to those distressed and at the same time "rewarding faithful and necessary service with reasonable compensation" (*In re Herz,* 81 F. (2) 511, 12, C. C. A. 7). In order not to burden the court with new evidence, it was stipulated that the court may decide the matter upon the same evidence which was submitted to the Commission (R. 118). This contemplated a reading of the evidence and judicial determination based thereon. It did not contem-

plate that the court should disregard all evidence and abide by the decision of the Commission no matter how arbitrary it was. The conclusion of the District Court that no matter what the evidence showed as to the value of the services, it had no right to reject the Commission's report (R. 9) could not be sustained under any theory.*

(c) *The District Court Had the Entire Record for Its Consideration and It Was Its Duty to Pass on the Evidence, and the Court of Appeals Was Mistaken When It Said That the Record Was Not Before the Court.*

The record discloses that the District Court had before it the evidence which was presented before the Commission (R. 118). It also had before it the evidence presented to the Commission pertaining to the plan for which the services were requested (36 Fed. Supp. 193, 200, 201). It was the duty of the court to determine whether petitioners were entitled to their expenses and fees based on the evidence and not upon the arbitrary report of the Commission.

If it be true, as the District Court held, that the report of the Commission was binding upon it, and that the District Court had to carry out the *ministerial* duty to enter the order, then the provision in allowing an appeal from the decision of the District Court is meaningless. In *Benson* v. *Cromwell*, 33 F. (2d) 137, *supra*, the same argument was made by the court. It said (p. 141):

> "If the judgment of the court herein is to be reviewed, what error could be found by another court if the court was required by the act to enter judgment in the amount found by the Deputy Commissioner?".

* The view of the District Court which was affirmed by the Seventh Circuit is contrary to its own decision in an opinion rendered prior to the denial of the rehearing (*Re Chicago & Northern R. R. Co.*, 121 F. (2) p. 791, which was called to the court's attention and which it considered (R. 158). There the same court said that "neither the scheme of the legislature nor the words of the statute justify the conclusion that the court was to delegate its judicial powers to the I. C. C. and merely sign the orders which the I. C. C. advised, or approve other orders which the I. C. C. made."

There the court also said:

> "Was the court to make its order without any hearing of the facts, to submit its judgment to the domination of the Deputy Commissioner because the act said to do it, if so, would not this of itself be an unconstitutional requirement?"

The court, in answering these questions, concluded there that it was the duty to hear the matter *de novo*. This court affirmed that decision. In the instant case the court did hear the matter *de novo* when it was stipulated that the judgment of the court be rendered upon the same evidence which was heard by the Commission. There was no understanding, however, that the court was to ignore the evidence, and enter its judgment based upon the arbitrary judgment of the Commission.

Even in cases where the court does not hear the matter *de novo*, but merely acts as a reviewing court, the report of the administrative body in such cases is "somewhat like a Master in Chancery" and the court "would test" the report by "the evidence submitted" (*Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 527), and under such circumstances it was held that it necessitated an examination of the evidence. The decision of the trial court, which was affirmed by the Seventh Circuit, cannot be sustained on any theory.

(d) *If It Be True That the District Court Did Not Have Any Evidence Before It, Then It Was in No Position to Make Any Allowances and to Overrule the Objections.*

The opinion states (R. 155) that the District Court could not have rejected the arbitrary report of the Commission and could not have determined whether its report was arbitrary or not because "the evidence upon which this finding was made was not before the District Court."* If this were

* It is difficult to understand this statement in the opinion. If this finding was made on the evidence before the Commission in support of the petition for fees, then the evidence was before the court (R. 118) and the opinion conceded that the testimony before the Commission tended to corroborate this statement for fees. A narrative statement of

true, then the entire report of the Commission had to be rejected and there would be no basis for the entry of any order as the Court would have no evidence before it upon which to base any judgment. Under no theory would the respondents be entitled to the $312,624.

V.

Section 77, as Distinguished from 77B Authorizes Allowances of Expenses to Parties and Fees to Their Attorneys, Regardless of Benefits Rendered to the Estate.

The entire report of the Commission is based upon a misconception of law that under section 77 parties and their attorneys are not entitled to their expenses if no benefit resulted to the estate. The benefits resulting to the estate is a factor in determining the amount of the compensation but is not to be considered on the question whether *any* compensation or expenses should be allowed.

(a) *There Is No Requisite Under Section 77 That Attorneys Representing Creditors Succeed in Their Efforts in Order to Entitle Them to Compensation.*

We have shown above that the intervenors and their counsel, the petitioners, have made valuable contributions to the estate. But, even if no benefits resulted to the estate, they were still entitled to the reimbursement of the expenses and to the compensation for their counsel. The Commission based its decision on the rule applicable to Section 77B which has no application to Section 77.

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such testimony appears in the record (R. 6-9). If the statements refer to the evidence before the Commission when the services were rendered, then such evidence was also before the court and a narrative statement of such evidence appears in the record (R. 2-6).

(1) *The Authorities Under 77B Are Inapplicable to Section 77.*

Section 77B requires that parties representing creditors *contribute beneficially to the estate. There is no such* requirement under Section 77. The Section authorized compensation to attorneys representing creditors *without regard as to whether the attorneys are successful or not.* The question is only whether they actually represented creditors who were parties to the record and whether they represented them on matters in which their rights were involved. All creditors who participated in bringing about the submission of the plan are entitled to reimbursement for the expenses and the compensation of the attorneys. The fact that the Court and the Commission allowed the intervention is to be considered in favor of the allowance of expenses and fees (*Steere* v. *Baldwin Locomotive Works,* 98 F. (2) 889).

(b) *The Commission Was Unable to Determine Whether the Services Were of Benefit to the Estate Prior to the Approval of the Plan by the District Court, and the District Court Was Unable to Determine Such Issue Prior to the Acceptance of the Plan by the Creditors.*

If the right to expenses and compensation be predicated on benefits resulting to the estate under Section 77, then neither the Commission nor the District Court were in a position to decide these issues on the state of the record.

(1) *The Commission Was Unable to Pass on the Question Whether the Services of the Petitioner Were Beneficial to the Estate Prior to the Approval of Its Plan by the District Court.*

The Commission rendered its report on the plan to which petitioner filed objections and suggested modifications on March 30, 1940 (R. 18-19). In the petition for fees

it was stated that in the event of the refusal to make the modifications petitioners would file objections in court seeking such relief, and in the event of the approval of the plan they would prosecute an appeal (R. 20). The objections to the plan were filed in court (R. 8). The Commission rendered its report on fees on October 7, 1940, finding therein that petitioners' services were not of value to the estate (R. 39). *The objections to the plan were then still pending in court and undisposed of.* It could not have *forecasted that the court would sustain its report.* It could not have based, at that time, its report on the fact that no beneficial services were rendered *before it knew whether its plan would be approved.* What if the court had sustained some of the objections?

Under 77B the plan is approved by the creditors in *advance* and the approval of the court *follows.* Therefore, unless the parties contributed something constructive to the modification of the plan which was approved by the creditors they should not be entitled to compensation. The situation under Section 77 is different as the Act provides that the plan is first to be approved by the Commission and by the court *before it is submitted to the creditors.*

In Section 77-B the allowance can only be made *after the approval of the plan by the creditors and by the court,* while under Section 77 *the allowance can be made even if the plan is rejected by the creditors and the court.* It is apparent therefrom that *the compensation under 77 is not measured by the approval or disapproval of the plan or by the contributions to the approval of the plan but by the services rendered leading up to the submission of the plan, regardless of its final success.* Section 77 (c) (12) allows compensation "for the actual and reasonable expenses, including reasonable attorneys' fees *incurred in connection with the proceedings and plan.*" It is *not conditioned* upon a contribution to the *final* adoption of the plan. The disallowance of the expenses of these intervenors and the fees of

their counsel is based on the *mistaken conception* that the law applicable to Section 77B is also applicable to Section 77, which is not the case, as shown above. This discussion is, however, only for *academic* purposes as appellants *did render valuable services* to the estate.

It is evident that the Act did not contemplate that the right to expenses and compensation of attorneys be determined by the Commission, based on benefits resulting to the estate.

(2) *The Court Was Unable to Pass on the Benefits to the Estate Until the Acceptance of the Plan by the Creditors.*

When the Court sustained the Commission's finding it knew that its judgment was not yet final as *the creditors had the right to reject the plan.* The court, therefore, was in no position to decide that issue at that stage of the proceeding. The appeal from the plan was prosecuted by these petitioners together with others, and it is still pending and undisposed of. The Circuit Court of Appeals took cognizance of the pendency of the appeal and considered petitioners' brief on the merits in connection with the petition for rehearing (R. 158). Petitioners were the only Appellants who appealed on behalf of the Adjustment bonds. The Trustee of the bond issue was not a party to the proceedings before the Commission pertaining to the Debtor's plan and did not become a party until after the filing of the Amended Plan in 1938. *No appeal was prosecuted by the Trustee of the bond issue,* but upon the filing of petitioner's brief on the merits on their appeal from the approval of the plan (which brief on the merits was considered by the Court in connection with the petition for rehearing) the Trustee filed an "Appellee's Brief" of *five* pages, *where it adopts the position of the Appellants.* We intend to file a motion in this court for leave to file copies of our brief on the merits as well as a copy of Trustee's

brief, due to the fact that our brief on the merits was considered by the Circuit Court of Appeals in connection with the rehearing. We also intend to ask leave to file a copy of the printed record insofar as it deals with a hearing before the Commission, which printed record will show the extent of the services rendered by the petitioners before the Commission at a date *when no other party represented this class.* It is significant to note that the Commission allowed *"nothing" to these petitioners* but did allow $18,715.00 to the Trustee and its counsel of this bond issue. The Respondents now contend on the appeal on the merits that the Trustee of the bond issue *"represents no one"* (p. 22). This is also the position of the Reconstruction Finance Corporation in its brief on the merits (p. 3). Being *the only representative of the class* and a party by intervention, it follows that petitioners were entitled to the reimbursement of their expenses and to the reasonable fees of their attorneys regardless of any benefit which might accrue to the estate, particularly in view of the pendency of the appeal which may still give greater benefits to the estate. It is, therefore, our position that Section 77 is wholly different from Section 77B and that *the act contemplates that parties who are let into the proceedings by the intervention are entitled to their expenses and to the expenses of their attorneys regardless of benefits resulting to the estate* and that the benefits may be considered in estimating the amount of the fees but not in considering whether any of the expenses and fees should be allowed.

(3) *Parties to the Proceedings or Those Who Were Let In by Intervention Are Entitled to Their Expenses and the Reasonable Fees of Their Attorneys, Regardless of the Success of Their Efforts.*

Section 77 c (12) authorizes the allowance of expenses of the parties and the compensation of their attorneys.

The court and the commission had the privilege to deny the intervention and petitioners would not have been parties to the proceedings, and if they performed any services they could not claim reimbursement for expenses and the fees of their attorneys. Both, however, the court and the Commission, *granted the intervention.* It must be assumed that *they properly exercised their discretion* and that the intervention was necessary. Petitioners, therefore, became parties to the proceeding by the orders of the court and the Commission. The Commission's power was, therefore, limited to fixing a "maximum" amount to expenses and fees, and the functions of the court were to determine the "reasonableness" of the charges. Neither the Commission nor the court had the right to deny the *total* fees and expenses. The rule that the powers of the court are limited in passing on the reasonableness of the amount but that the court is without power to deny *any* amount where the party comes within the Act was squarely held *In Re Building Development Company,* 98 F. (2) 844, C. C. A. 7. There the court also said (p. 846):

> "The rule which clearly is deductible from authorities is that where the party designated by the Act renders services in connection with the proceeding and plan, the court **may not,** unless some special justification, refuse to allow any compensation whatever."

Here, the Seventh Circuit failed to apply the rule which it announced above.

For the foregoing reasons we urge the issuance of the Writ.

Respectfully submitted,

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FILED
OCT 16 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 631

IN THE MATTER OF
CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY,
Debtor.

ISRAEL A. ABRAMS, ET AL., ETC.,
Petitioners,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

A. N. WHITLOCK,
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 631.

IN THE MATTER OF
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

DEBTOR.

ISRAEL A. ABRAMS, ET AL, ETC.,
Petitioners,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Petitioners seek to review a judgment (R. 156) of the United States Circuit Court of Appeals for the Seventh Circuit entered May 20, 1941, (rehearing denied June 23, 1941; R. 159) affirming an order of the United States District Court for the Northern District of Illinois, Eastern Division, entered November 13, 1940, (R. 124) in the pend-

ing reorganization proceeding, under Section 77 of the Bankruptcy Act, of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor. The decision of the Circuit Court of Appeals is reported at 121 Fed. (2nd) 371.

The order appealed from overruled the objections (R. 103) of the Petitioners herein to the report (R. 39) and order (R. 76) of the Interstate Commerce Commission of October 2, 1940, fixing maximum limits for allowances for fees and expenses incurred and compensation for services rendered in connection with the proceeding and plan therein and denied the fees and expenses requested by Petitioners. The Petitioners initiated the prosecution of their claim by filing a petition with the District Court (R. 13) pursuant to the provisions of Section 77 (c) (12), 11 U. S. C. A. 205 (c) (12), of the Bankruptcy Act. The petition was filed within the time fixed by order of Court dated April 26, 1940, (R. 10) and covered all services and expenses claimed up to the fifteenth day of May, 1940. The Petitioners, as set forth in said petition, represent the holders of Convertible Adjustment Mortgage Bonds of the Debtor in the principal amount of $31,500. (R. 14) They asked for an allowance of $12,500 for services and $436.80 for expenses incurred, all to be paid out of the Trust Estate. The prayer of that petition (R. 22) recites:

> "Wherefore, petitioner prays:
>
> 1. That after the Commission has fixed a maximum allowance to petitioner for the services rendered from July, 1935, to May 15, 1940, an order be entered herein authorizing and directing the Debtor's Trustees to pay to the firm of Shulman, Shulman and Abrams, out of the estate of the Debtor, the sum of Twelve Thousand Five Hundred Dollars ($12,500.00), or such other sum as the Commission may fix as a maximum allowance."

A detailed statement of the alleged services and expenses was attached to the petition so filed. That petition, with the petitions of other claimants, was referred to the Inter-

state Commerce Commission in accordance with the provisions of Section 77 (c) (12), a hearing was had upon the petitions filed and on October 2, 1940, the Commission made its report and order (R. 36-79) in which all claims filed were considered and a maximum limit was fixed for each claim. In three instances, one of which was the claim of Petitioners, a maximum limit of nothing was fixed. (R. 79)

Petitioners thereafter filed with the Commission a petition for rehearing or for modification of its order of October 2, 1940 (R. 81), and also filed with the District Court objections to the report and order of the Commission. (R. 103) The petition for rehearing was denied by the Commission on November 5, 1940. (R. 116) The District Court, on November 13, 1940, made Findings of Fact, Conclusions of Law and Order and Decree as to allowances to various claimants. (R. 117) Finding of Fact No. 4, so made by the Court, was as follows:

> "4. The Court finds that the maximum limits so fixed by the Commission in each case constitute reasonable allowances to be made to the respective claimants for services rendered and expenses incurred in connection with the proceedings and plan by said claimants up to May 15, 1940, and do not exceed reasonable compensation for such services and expenses." (R. 119)

These Findings, Conclusions, Order and Decree were made after hearings held pursuant to order and due notice upon objections to the plan of reorganization and petitions for allowances at which hearings the matter of allowances was, by agreement of all claimants, submitted to the Court upon the record made before the Examiner of the Interstate Commerce Commission. (R. 119) The Court's order overruling Petitioners' objections to the report and order of the Commission and denying the fees and expenses requested by Petitioners, which is the order appealed from, was likewise entered on November 13, 1940. (R. 124)

The record does not contain a stenographic transcript of the hearing before the Commission's Examiner but does contain a narrative statement (R. 2-9) in which Petitioners undertake to summarize their activities at the several hearings had before the Commission with reference to the plan of reorganization and their testimony given before the Examiner.

The Commission, in its report (R. 69) says:

> "Shulman, Shulman & Abrams represent holders of $31,500 of Convertible Adjustment Mortgage Bonds and performed services and incurred expenses from July 18, 1935. They intervened in the proceeding before the Court and the Commission, participated in hearings before the Commission on a plan of reorganization, filed exceptions to the report of the Examiner on a plan, and filed a petition for modification of the Commission's plan. They participated in the court proceeding on the question of the appointment of trustees, examined notices, motions and petitions, and appeared in court whenever necessary. They state that their efforts were primarily responsible for the abandonment of the first plan, and the abandonment of the proposal for a voting trust. We are not persuaded that the evidence supports such a statement. The firm submitted a statement showing the matters attended to on specific dates, but had no statement of time spent on the work. Its estimate of the time spent is 1,000 hours. We find that the services rendered were of no benefit to the estate."

and in its order, in which the various maximum limits of allowances are listed, the Commission provides:

> "(q) For services rendered and expenses incurred by Shulman, Shulman & Abrams, representing holders of the Debtor's bonds, nothing." (R. 79)

The Circuit Court of Appeals, in its opinion, (R. 148, 151) reviewed the legislative history of Section 77 (c) (12) and concluded that the Interstate Commerce Commission was authorized to fix maximum limits for the various indi-

vidual claimants and was not limited to the fixing of a maximum limit for the aggregate of allowances to the several claimants as contended by these Petitioners. The Court further held that there was no unauthorized delegation of judicial power to the Commission; that the claim presented arose after bankruptcy and that the claimants have no vested rights to any allowance out of the Trust Estate; that Congress had the power to refuse all compensation from the estate of the Debtor from which it follows that Congress could lawfully provide for limited compensation and designate the tribunal which should determine the maximum amount thereof. Finally, the Court points out that the Commission found that the services of the Petitioners were of no value to the estate and that, therefore, the charge that the Commission, in denying Petitioners any relief, acted arbitrarily and capriciously must be rejected. The Court concludes its opinion with the following:

> "In the face of the findings and conclusion of the Commission, which was within its authority, and which was backed by personal knowledge of the extent and value of services rendered, we are convinced that the District Court correctly held it was powerless to allow appellants any sum in this case." (R. 156)

SUMMARY OF ARGUMENT.

I. The order appealed from was one refusing to set aside the order of the Commission fixing maximum allowances. This latter order was made in strict conformity with the applicable statute.

(a) The statute authorizes the Commission to fix a maximum allowance for each claimant.

(b) Petitioners cannot complain of procedure which they specifically requested.

II. The District Court was without authority to make an allowance to Petitioners in excess of the maximum fixed or to set aside such maximum.

III. The record supports the action of the Commission and negatives any arbitrary action.

IV. The application of the statute (Section 77 (c) (12)) involves no improper delegation of judicial power.

V. Petitioners are deprived of no constitutional right as a result of the application of the statute.

VI. No ground for the issuance of the Writ as set forth in Rule 38 of this Court or otherwise is presented by the record.

ARGUMENT.

The Trustees of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Respondents herein, respectfully submit that the case presented is not one in which certiorari should be granted for the reasons hereinafter set forth.

I.

The Order Appealed From Was One Refusing to Set Aside the Order of the Commission Fixing Maximum Allowances. This Latter Order Was Made in Strict Conformity With the Applicable Statute.

The statute pursuant to which Petitioners' application for allowances was submitted to the Interstate Commerce Commission for the fixing of a maximum is Section 77 (c) (12) of the Bankruptcy Act; 11 U. S. C. A. 205 (c) (12), which reads:

> "(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily."

Attention should also be called to a portion of Section 77 (e); 11 U. S. C. A. 205 (e). This subdivision provides for the certification of a plan by the Commission to the Court, the giving of notice to parties in interest of the time within which objections to such plan may be filed with the Court and for a hearing upon such objections, and then continues:

> "After such hearing and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of sub-section (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same."

Rule XLIX of the Rules in Bankruptcy of this Court provides, among other things, that the Clerk of the District Court in which any proceeding under Section 77 is pending shall forthwith transmit to the Interstate Commerce Commission copies of certain designated instruments, among others:

> "(1) Any application for allowances of compensa-

tion and expenses under the provisions of paragraphs (2) and (12) of sub-section (c) of Section 77, upon receipt of which the Commission shall determine the maximum limits of such allowances and file with the Court its report and order thereon, and any order making allowances for compensation and expenses under said paragraphs."

It is apparent from the foregoing that allowances of the character here involved made by the District Court must be within the maximum limits fixed by the Commission. The first sub-division quoted permits such allowances only within such limits. The Court rule quoted recognizes this limitation and sub-division (e), quoted above, expressly conditions the Court's approval of a plan upon the finding by the Court, among other things, that the amounts to be paid by the Debtor, or by any corporation or corporations acquiring the Debtor's assets, for expenses and fees incident to the reorganization are within such maximum limits fixed by the Commission.

It is difficult to see how Congress could have set forth with greater clarity the legislative intent to give to the Commission the power to fix maximum limits for allowances of this character beyond which the Court should not go.

This Court has pointed out, in

Dickinson Industrial Site, Inc., v. *Cowan*, 309 U. S., 382, 388,

that the purpose of reorganization statutes in thus regulating allowances to be made from the Trust Estate was to place such allowances under more effective control. To that end the statute required petitions for such allowances to be considered first by the Interstate Commerce Commission, a body skilled in matters affecting railroads and railroad reorganizations and well qualified to pass upon the value of the services rendered in connection therewith.

(a) *The Statute Authorizes the Commission to Fix a Maximum Allowance for Each Claimant.*

While Petitioners filed their petition asking that the Commission fix a maximum allowance for their services and that the Court make an order directing payment to them of such sum as the Commission might fix as such maximum, after the Commission, following a hearing, had fixed the maximum in their case at nothing, they then took the position on their appeal that under the statute quoted above the Commission was authorized only to limit the maximum expense or burden upon the Estate by fixing the maximum limit of the aggregate of the allowances to the several claimants and was not authorized to fix a maximum for an individual claimant.

There is certainly nothing in the statute which indicates that the Commission shall fix a maximum for the aggregate of all allowances as distinguished from limits for individual allowances. Moreover, it is difficult to see how the Commission could arrive at a maximum for the aggregate without taking into consideration the extent and character of the work performed by the individual claimants and reaching a conclusion as to the maximum limits which should be fixed in individual cases.

Moreover, as pointed out by the Circuit Court of Appeals, the language of the statute is significant. Sub-division (c) (12), in the opening line, refers to "maximum limits," indicating more than one limit, and again, in the last sentence of the sub-division, we find the provision that the Commission shall, after hearing, "fix the maximum allowances which may be allowed by the Court." Such allowances may be made "at such time or times" as the Commission may deem appropriate.

The Circuit Court of Appeals, in its opinion, (R. 148,

151) reviews the legislative history of the pertinent provision of the statute and reaches the conclusion that it was the legislative intent that the Commission fix a maximum for each claimant.

Petitioners, in their brief, (B. 20) state that the Commission in this proceeding fixed the aggregate maximum limit and then proceeded to make allowances to the individual claimants. We submit that the report of the Commission shows that the procedure followed was just the opposite. In its conclusions (R. 72) the Commission starts out by listing each claimant and thereupon fixes a maximum limit for each claim. The total of such maximum limits was arrived at by adding the individual limits so fixed. This is made clear by the recital in the Commission's report. (R. 71) We believe that this is the procedure uniformly followed by the Commission in the railroad cases which have come before it.

In that connection we call the Court's attention to the report of the Commission in

Savannah & A. Ry. Reorganization, Finance Docket No. 11336, 228 I. C. C. 543, 560.

The Commission there said:

> "The argument is advanced by some of the petitioners herein that under the statute we are required only to fix the 'outside limits' of allowances for all services and expenses appropriate to the financial and economic condition of the debtor, and that it is the exclusive function of the court to determine the exact amount of the individual allowances. To assume the correctness of this contention suggests the question whether our determination of outside limits should be based on considerations of the services rendered and expenses actually incurred or solely on considerations of the size of the estate, its financial structure, and its earning power. To decide that the considerations are to be exclusively those last enumerated would be to disregard such factors as eminence of counsel, the

nature of the services rendered by them, the degree of skill and ability required and displayed by them, the period covered by the negotiations and activities in connection with which the compensation is asked, and the time devoted to the services. But such a conclusion is not reasonable. Clearly, we must consider each of these matters and it follows that we must give detailed consideration to the services of each claimant. It is our view that in fixing maximum limits of allowances consideration should be given to all the matters referred to above, so that the total allowance for compensation and expenses may be within a reasonable maximum for the property involved and at the same time the individual allowances reasonable for each of the claimants. Since the maximum total allowance fixed by us is based in part on a consideration of the reasonable maximum for each claimant, it appears inappropriate that the total allowance should be distributed between the claimants on a different basis."

We cannot improve upon the argument advanced by the Commission in support of its own action.

So far as we are advised, this procedure has not been questioned in any decided Court case prior to this one.

(b) *Petitioners Cannot Complain of Procedure Which They Specifically Requested.*

As shown by the portion of the prayer of the original petition quoted in the Statement of Facts, the Court was specifically requested to make an allowance within the limit fixed by the Commission. The Court complied strictly with the request of the petition. Petitioners did not ask the Commission to fix an aggregate maximum limit to be used by the Court in arriving at individual allowances, but, on the contrary, asked both the Commission and the Court to do, so far as procedure is concerned, exactly what was done and what the statute requires, namely: to make an individual allowance to the

Petitioners after the Commission had fixed the maximum limit therefor. Petitioners should be precluded from objecting to the procedure followed by the rule of law announced in

United States v. *Memphis*, 97 U. S. 284, 292.
Mercelis v. *Wilson*, 235 U. S. 579, 583.

II.

The District Court Was Without Authority to Make an Allowance to Petitioners in Excess of the Maximum Fixed or to Set Aside Such Maximum.

If we are correct in our interpretation of the statute, then, obviously, the Commission having fixed the maximum limit, the Court, assuming the validity of the statute, could not make an allowance in excess of that limit. This view was taken by Judge Barnes in

In Re Chicago & North Western Railway Company, 35 Fed. Supp. 230,

in which the Court said, at page 258:

> "Counsel for some of the mortgage trustees have asked the court to find the reasonable value of their services. This the court must do within the maximum limits fixed by the Interstate Commerce Commission. But whether the reasonable value of the services exceeds the maximum limits fixed by the Commission is, so far as this court is concerned, an academic question which this court has no power to determine and which it accordingly must decline to examine."

Having in mind that the whole purpose of Section 77 (c) (12) was to give to the Commission the power to limit allowances, it is obvious that if the District Court, after the maximum is fixed, can review it and set it aside, then the whole purpose of the provision has been defeated and the result is the same as if the sub-division had not been enacted.

We submit that Petitioners are in error in asserting that the decision in this case is inconsistent with the decision of the same Court in

C. & N. W. Ry. Co. v. *Reconstruction Finance Corporation*, 121 Fed. (2nd) 791.

That was a case in which two orders were before the Circuit Court of Appeals. One of them was an order denying the motion of a Debtor in a Section 77 proceeding to direct the Interstate Commerce Commission to make and determine maximum allowance to the Debtor for expenses of printing the record on appeal. The other was an order denying the Debtor's motion for an allowance of an expense authorization to cover the printing of the record on appeal. The Court concluded that the order denying Debtor's petition for order directing the Interstate Commerce Commission to fix maximum limits should be affirmed but that the other order should be reversed and the case sent back to the District Court to determine what, if any, allowance should be made to the Debtor for said purpose, the Court taking the view that, in the light of the provisions of Section 77 giving the Court exclusive jurisdiction of the Debtor and its property, and in view of the further fact that the allowances sought were for future expenses, the case was not controlled by Section 77 (c) (12). The Court said, (798):

> "We do not say that the court should grant or deny the petition. On this question we do not now pass. We merely hold that it was within the court's power to act and to allow, if the facts warranted it, out of the estate of the debtor, the amount necessarily required for printing the record on appeal.
>
> "This authority is not controlled by Sec. 77, sub. c (12), which provides for payment out of the debtor's estate of actual and reasonable expenses, including reasonable attorney's fees incurred in connection with the proposed plan or plans by parties in interest and by reorganization managers and committees or other

representatives of creditors and stockholders, in which case the I. C. C. must determine the maximum allowances. *Abrams* v. *Scandrett, et al.*, 7 Cir., 121 Fed. (2nd) 371, decided by this court May 20, 1941."

The distinction between that case and this one was undoubtedly as clear to the Circuit Court of Appeals as it is to us, since upon the petition for rehearing in this case the Court considered the decision in the North Western case, (R. 158) which had been rendered in the meantime, and, after such consideration, denied the petition for rehearing. (R. 159)

The question of whether or not there is a review of the order of the Commission in fixing a maximum, and, if there is, by what method it shall be accomplished, is not here involved except insofar as it is contended that the District Court had such right of review and we submit that it is clear under the statute that no such review is provided. Moreover, it seems certain that to accomplish any such review of an order of the Commission, it would be necessary that the Commission be a party to the proceeding.

As we shall point out later herein, there is no question of arbitrary or capricious action on the part of the Commission in the light of the finding, after a full hearing, that the services for which compensation is claimed were of no value to the Trust Estate and consequently the question of existence or method of review in such cases is not presented.

We submit that there is no merit in the suggestion that the case where a limit of "nothing" is fixed differs from one involving other limits. As we shall later point out, the Commission, in arriving at maximum limits, passes upon certain questions of fact, particularly the value of the service rendered to the estate, and those questions are the same and the action of the Commission is the same,

whether or not the limit fixed is a substantial sum or nothing.

III.

The Record Supports the Action of the Commission and Negatives Any Arbitrary Action.

The record contains a narrative statement of the evidence which was before the Commission. (R. 2-9) It is to be presumed that Counsel, in preparing this narration, set out fairly and fully the services for which compensation was sought. It appears from the statement that the claim is made that at an early hearing before the Commission Counsel for the Petitioners brought out by cross-examination that the average net available income for certain years was less than the required fixed charges. It is hardly conceivable that at a hearing upon a plan of reorganization the earnings statements of the Debtor were not in the record and of necessity the plan being considered would set forth the required fixed charges and no claim is made that these facts were not before the Commission. It is further claimed that Counsel for Petitioners brought out what amounts to nothing more than a simple arithmetical deduction that, since under the proposed plan certain contingent interest was made cumulative, if it should turn out that the fixed charges exceeded the earnings, in case of default the stock and junior securities might be wiped out on foreclosure. It is urged that Counsel brought out through another witness in 1937, two years after the initial plan was proposed, that certain changes were desirable to remove some uncertainties. It further appears from the statement that Counsel objected to a postponement; that following an exchange of letters, between persons in no way connected with the Petitioners, certain modifications were proposed. It is pointed out that Counsel for the Petitioners participated in the pro-

ceedings relating to the appointment of Trustees and suggested that, in addition to an officer of the Debtor, an independent Trustee be appointed, something that was required by the law at the time of the actual appointment of the Trustees. Sec. 77 (c) (1); 11 U. S. C. A. 205 (c) (1). It is also stated that Counsel for Petitioners interviewed several persons as to their availability for appointment as Trustee but it turned out that none so interviewed desired the position. Finally, the statement recites that Counsel for the Petitioners opposed the Voting Trust but a provision for a Voting Trust was ultimately included in the plan.

It hardly seems possible that upon such a record Counsel would urge that the action of the Commission in concluding that his services were of no value to the Trust Estate was arbitrary action. The Commission, at the time of its order, not only had before it the complete transcript of the hearings before its Examiner, which hearings were extensive and at which Petitioners had every opportunity to be heard, but it also had the record of the entire proceeding and had firsthand knowledge of what was done by all interested parties, including Petitioners and their Counsel, in connection with all of the hearings before the Commission. The Commission was, therefore, in the best possible position to determine what, if anything, was contributed by the claimants to the proceeding or the plan. In the face of that record and firsthand knowledge, the Commission concluded that Petitioners had contributed nothing of value and fixed the maximum to be allowed at zero. Two Courts have declined to overturn the Commission's action and we submit that the record presents not even a suspicion of arbitrary action in the premises.

Petitioners make much of the statement in the opinion of the Circuit Court of Appeals that the evidence upon which the finding of no value to the estate was made was

not before the District Court. As pointed out in the Statement of Facts the matter of allowances was submitted to the Court upon the record made before the Examiner of the Interstate Commerce Commission. (R. 119) The Commission, in addition, had personal knowledge of the participation by Petitioners and their Counsel in the hearings before it. The District Court did not have this firsthand information and we believe that is what the Circuit Court of Appeals had in mind in using the language to which Counsel refers. When the Petitioners raised this same point in their petition for rehearing in the Circuit Court of Appeals, we suggested this probable explanation of the statement. The Court denied the petition for rehearing and made no change in the statement or in its judgment. However that may be, Petitioners presented to the Circuit Court of Appeals, and now present here, their narration of the evidence as to their services and upon such showing the Circuit Court of Appeals concluded, we think correctly, that it could not be said that the refusal of allowance to Petitioners was arbitrary or capricious.

In cases where the right of review admittedly exists, we believe it must be conceded that the findings of the Commission will not be disturbed unless it appears that the Commission acted arbitrarily or without evidence to support its conclusion or that it transcended its constitutional or statutory powers.

Standard Oil Co. v. *U. S.*, 283 U. S. 235, 240.

Seaboard Air Line Ry. Co. v. *U. S.*, 254 U. S. 57, 62.

Interstate Commerce Commission v. *Union Pacific R. R.*, 222 U. S. 541, 547.

Petitioners offer as an answer to our contention under this point of the argument that they were granted the right of intervention in the proceeding from which it must be assumed that intervention was necessary; that through

their Counsel they did a certain amount of work and participated in the hearings and from that it follows that they are entitled to compensation, regardless of whether or not their efforts have been of any benefit to the Trust Estate. Incidentally, they say that the beneficial character of the service cannot be determined until the plan is finally passed upon. They seek also to distinguish the 77B cases and point out that there is no requirement under Section 77 that the services to be compensated contribute beneficially to the estate.

The answer to these contentions is clear. The services for which compensation was sought were rendered prior to the hearing upon the plan before the District Court but the proceedings had reached a stage where such hearings were imminent. The work leading up to the framing of the plan and its submission had been done and the Commission was in the best position possible to determine the value of the alleged services. The contention that any intervenor is entitled to compensation for any work done is both contrary to the spirit of the statute and to common sense. To carry Petitioners' contention to its logical conclusion, the Commission would be required to fix a maximum limit in some amount for any claimant who secured the right to intervene, appeared at the hearings, filed a petition for an allowance and prosecuted it through a hearing. We submit that such a construction of the statute cannot be justified.

The substantial difference upon the point of allowance between Section 77B proceedings and the proceedings under Section 77 is that in 77 proceedings the Commission fixes the maximum limit whereas in 77B proceedings the matter of allowances is left to the Court, but the character of the service that should be compensated is the same in both proceedings. The cases generally hold that the character of the service, to be compensable from the funds

of the estate, must in some way have contributed to the proceeding or the plan or have promoted or assisted in the development or adoption of a plan or have benefited the estate of the Debtor. A few of the leading cases will be sufficient to illustrate the rule:

In Re United Cigar Stores, 21 Fed. Supp. 869, 874.

In Re Consolidated Motor Parts, Inc., 85 Fed. (2nd) 579, 581.

In Re Tower Building Corp., 88 Fed. (2nd) 347, 349.

In Re Nine North Church Street, Inc., 89 Fed. (2nd) 13, 14.

In Re A. Herz, Inc., 81 Fed. (2nd) 511, 512.

Straus, et al. v. *Baker Co.,* 87 Fed. (2nd) 401, 407.

Silver v. *Scullin Steel Co.,* 98 Fed. (2nd) 503, 505.

Schnader v. *Reading Hotel Corp.,* 105 Fed. (2nd) 572, 573.

In the case of *D. & R. G. W. R. Co.* v. *McCarthy,* 111 Fed. (2nd) 820, 823, the Circuit Court of Appeals of the Tenth Circuit considered the question of allowances in a Section 77 proceeding and in the opinion makes it clear that the action of the Trial Judge, in postponing the making of an allowance within the maximum limit fixed by the Commission until the proceedings had reached a stage so that he might be in a position to properly appraise the value of the services, especially those rendered in connection with the plan of reorganization, was justified. This indicates that the attitude of the Court was that the requirement of benefit to the Trust Estate is the same in Section 77 proceedings as in those arising under 77B.

In the last analysis, the Petitioners here desire to set aside a finding of the Interstate Commerce Commission made after an extensive hearing and full consideration. It is submitted that there was no error or arbitrary action

upon the part of the Commission in reaching the conclusion that the services claimed were not compensable out of the Estate of the Debtor.

IV.

The Application of the Statute (Section 77(c) (12)) Involves No Improper Delegation of Judicial Power.

The delegation of quasi-judicial functions to Administrative Commissions is not new. In fact, the delegation of such powers to the Interstate Commerce Commission is quite old. The case of *Kline* v. *Burke Construction Company*, 260 U. S. 226, 234, makes it clear that the inferior Federal Courts derive their jurisdiction from the authority of Congress and that Congress may give, withhold or restrict such jurisdiction at its discretion provided it be not extended beyond the boundaries fixed by the Constitution.

Many decided cases have involved action by Administrative Commissions in which the alleged delegation of judicial power has been considered. The following are typical examples:

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 400.

Sullivan v. *Union Stockyards Co. of Omaha, Ltd.*, 26 Fed. (2nd) 60, 61.

Arkansas Wholesale Grocers' Assn. v. *Federal Trade Commission*, 18 Fed. (2nd) 866, 871.

Shields v. *Utah Idaho Cent. R. R. Co.*, 305 U. S. 177, 180.

Shouse v. *Moore*, 11 Fed. Supp. 784, 786.

The *Bituminous Coal Act of 1937*, giving to the Bituminous Coal Commission authority to determine certain issues and exemptions, was under consideration in the *Sunshine Anthracite Coal Company case*, 310 U. S. 381, 400.

The Court, in upholding the constitutionality of the Act, at page 400, said:

> "Nor is there an invalid delegation of judicial power. To hold that there was would be to turn back the clock on at least a half century of administrative law. The question of whether or not appellant should be subjected to the regulatory provisions of the Bituminous Coal Act was one which the Congress could decide in the exercise of its powers under the commerce clause. In lieu of making that decision itself, it could bring to its aid the services of an administrative agency. And it could delegate to that agency the determination of the question of fact whether a particular coal producer fell within the Act. *Shields* v. *Utah Idaho Central R. Co., supra,* p. 180. The fact that such determination involved an interpretation of the term 'bituminous coal' is of no more significance here than was the fact that in the *Shields case* a decision by the Interstate commerce Commission of what constituted an 'interurban' electric railway was necessary for the ultimate finding as to the applicability of the Railway Labor Act to carriers. That problem involves no more than the adequacy of the standard governing the exercise of the delegated authority. Furthermore, on this phase of the case, appellant has received all the judicial review to which it is entitled. As we have seen, it obtained a review under Sec. 6 (b) of the Commission's denial of its application for exemption. The functions of the courts cease when it is ascertained that the findings of the Commission meet the statutory test. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146."

The following language is found in *Shields* v. *Utah Idaho Cent. R. R. Co.,* 305 U. S. 177, 180, where the Court was considering a finding of the Commission that certain lines of the railroad company did not constitute an interurban electric railway and, therefore, did not come within the exceptions set forth in the *Railway Labor Act*:

> "As Congress was free to establish the categories which should be excepted, Congress could bring to its

aid an administrative agency to determine the question of fact whether a particular railroad fell within the exception, and Congress could make that factual determination, after hearing and upon evidence, conclusive. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 51. For that purpose Congress could create a new administrative agency or use one already existing. And as the questions of fact involved would relate to methods of railroad transportation, and thus to a field in which the Interstate Commerce Commission had peculiar expertness, Congress could fittingly commit the determination to that body."

In the *Arkansas Wholesale Grocers' Assn. case,* 18 Fed. (2nd) 866, the *Federal Trade Commission Act* was involved. The opinion, at page 871, contains this language:

"The general power of Congress to clothe an administrative body with such authority is thus expressed by the Supreme Court in *Union Bridge Co.* v. *U. S.,* 204 U. S. 364, 27 S. Ct. 367, 51 L. Ed. 523:

" 'Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.' Id., page 387 (27 S. Ct. 374)."

The case of *Sullivan* v. *Union Stockyards Co. of Omaha, Ltd.,* 26 Fed. (2nd) 60, involved the *Packers & Stockyards Act of 1921* and the Court, in discussing the question of judicial powers, at page 61, said:

"It is claimed, however, that such an interpretation of the Packers and Stockyards Act and of the Act to Regulate Commerce renders them unconstitutional, because it gives to the Secretary of Agriculture, in the one instance, and to the Interstate Commerce Commission, in the other, judicial powers. No case is cited in the plaintiff's brief which has any bearing on the specific question. He refers to the general proposition that executive, legislative, and judicial functions

shall be kept separate, and that persons intrusted with power in any one of these three branches shall not be permitted to encroach upon the powers confided to others. About this, of course, there is no dispute. * * *

"It is the general rule that 'statutes conferring on officers, boards, or commissions quasi judicial functions, as, for example, the necessity of inquiry into, and a finding of, facts incidental to the exercise of powers properly within the scope of legislative or executive authority, are not unconstitutional as encroachments on the judiciary.' 12 C. J. 809."

In the case of *In Re New York, New Haven & Hartford R. Co.*, 16 Fed. Supp. 504, 507, the Court was discussing another provision in Section 77 to the effect that no plan of reorganization shall be approved or confirmed by the Judge unless the plan shall first have been approved by the Commission. The Court says:

"As stated, the criticism here is not that power was conferred upon the Interstate Commerce Commission, which constitutionally it was incapable of receiving, but rather that the exercise of a judicial power, which under article 3, section 1, may be vested only in a court, was expressly conditioned upon prior action of the Commission.

"But the limitation, against which the petitioner inveighs, is not at all a limitation upon the judicial power; it serves not at all to constrain the court in the unfettered performance of its judicial function when once the conditions prescribed by Congress as prerequisites to its jurisdiction have attached. At most, it is a jurisdictional limitation restricting the field which is subjected to the operation of the judicial power. Within the field defined, there is no attempt to subject the judicial power to the control of the legislative or executive departments. Such a jurisdictional limitation upon the court is wholly within the constitutional power of Congress to impose. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077; *Sheldon* v. *Sill*, 8 How. 441, 448, 12 L. Ed. 1147."

It will be observed that the matter of formulating the plan of reorganization and requiring that the Court shall pass only upon such plan as the Commission formulates is a very much more important matter than the question of allowances to claimants.

Opposing Counsel rely (B. 16) upon the case of *Benson* v. *Crowell*, 33 Fed. (2nd) 137, affirmed in 45 Fed. (2nd) 666; Certiorari allowed in 283 U. S., 814, and affirmed in 285 U. S. 22. That case arose under the Longshoremen's and Harbor Workers' Compensation Act. The action was brought to enjoin the enforcement of an award and it was enjoined upon the ground that the claimant was not an employee and, therefore, the necessary jurisdiction to make the award did not exist. Moreover, provision for review was specifically made and the review was accomplished by an independent proceeding.

Counsel also quote from several reports of the Interstate Commerce Commission (B. 17-18) in which the Commission, in certain instances, fixed a maximum limit and left for the Court's decision the question of whether or not the service was of a kind that was compensable out of the Debtor's Estate, stating that it was the function of the Court and not of the Commission to determine whether and to what extent such allowances constitute a proper charge. A typical example is in the *Erie Reorganization*, 240 I. C. C., 673, 694, where one question was whether allowances for services rendered to lessor companies of the Debtor should be paid out of the Estate of the lessee and this was held to be a Court question. The other cases cited are similar and do not conflict with the conclusion that it is the proper function of the Commission under the statute to determine whether the services rendered were of any value to the Estate. Admittedly, Counsel for Petitioners put in certain time and there is no question as to whether or not these claimants were in a class which could reason-

ably be compensated out of the Debtor's Estate for any useful service, but the question was rather whether or not any service beneficial to the Estate had in fact been rendered.

The questions involved in connection with this claim were the nature of the services rendered and benefits inuring to the Estate, if any, and the value of the services, fact questions. In discussing such a situation the Court, in the case of *Silver* v. *Scullin Steel Co.*, 98 Fed. (2nd) 503, 506, says:

> "(10, 11) When an application for an allowance of fees out of the estate of a debtor is made by counsel retained by creditors or stockholders, the question of what services were actually rendered, the question of the benefits which inured to the estate because of the services rendered, and the question of what proportion of the total services performed can be and should be paid for by the estate, are mainly questions of fact, and the conclusion of the court of bankruptcy as to what may reasonably be charged to the estate on account of such services, should, therefore, not be disturbed on appeal unless it clearly can be seen that there is no adequate factual basis for such conclusion or that the court proceeded upon an erroneous theory of the law in arriving at it."

In fixing a maximum limit the Commission exercises its discretion but certainly the exercise of discretion by the Commission in the decision of the many questions presented to it does not constitute an exercise of judicial power within the prohibition of the Constitution. The right of the Commission to exercise discretion has been expressly recognized.

> *U. S., ex rel. Chicago Great Western R. Co.* v. *I. C. C.*, 71 Fed. (2nd) 336, 340.

V.

Petitioners Are Deprived of No Constitutional Right as a Result of the Application of the Statute.

The right to an allowance for services rendered by claimants such as Petitioners in connection with reorganization proceedings and plans does not exist in the absence of statute. If Section 77 (c) (12) is for any reason invalid and claimants are deprived of its application, then neither they nor other claimants have any right to seek compensation from the Estate of the Debtor. It may be said generally that allowances to creditors, counsel for creditors, mortgage trustees, committees and claimants of that character are not provided for in ordinary bankruptcy proceedings. The Circuit Court of Appeals for the Second Circuit, in the case of *In re Realty Associates Securities Corporation,* 69 Fed. (2nd) 41, 42, says:

> "No provision is made in bankruptcy for payment of compensation or expenses to creditors or creditors' committees or their counsel in instances of ordinary bankruptcy administration."

The same Court states the rule in another case *In re Paramount Publix Corp.,* 85 Fed. (2nd) 588, 590, as follows:

> "Both in proceedings in equity and in bankruptcy simpliciter it is the ordinary rule that attorneys representing creditors, security holders, or stockholders must look for compensation to their clients rather than to the general estate. *In re New York Investors* (C. C. A.) 79 F. (2d) 182, 186, certiorari denied *Endelman* v. *Reconstruction Finance Corp.,* 296 U. S. 649, 56 S. Ct. 308, 80 L. Ed. 462; *In re Realty Associates Securities Corporation* (C. C. A.) 69 F. (2d) 41, certiorari denied *Bondholders' Committee* v. *Realty Associates Securities Corp.,* 292 U. S. 628, 54 S. Ct. 631, 78 L. Ed. 1482."

The allowance in equity proceedings of reasonable compensation out of a trust fund to one who at his expense

takes proper proceedings to preserve the trust property from destruction and restore it to the purposes of the trust is more restricted than the statutory rules under the Bankruptcy Reorganization Acts. The equity doctrine would not authorize the payment of claims of the character here presented.

See *Collection of Authorities*, 49 A. L. R. 149 and 107 A. L. R. 749.

Section 77B, 11 U. S. C. A. 207, and Chapter X of the Chandler Act, 11 U. S. C. A., 642, create a statutory right to make certain allowances in the reorganization proceedings of other than railroad corporations and a similar right in railroad reorganizations is fixed by Section 77 (c) (12), 11 U. S. C. A. 205 (c) (12).

When Section 77 was enacted the right to allowances was one which Congress could give or withhold as it saw fit. It might have provided positively that no such allowances should be made. From this it would seem to follow that Congress could place a limitation upon such allowances. In the case of *Nuckolls* v. *U. S.*, 76 Fed. (2nd) 357, 360, the Court, in considering the provisions of the Revenue Act of 1928, says this, with reference to conditions attached by Congress to privileges granted by statute:

> "Congress is not required by the Constitution to extend the privilege at all, as indeed it did not prior to 1926; when it did so, it had a right to attach thereto this condition. The taxpayer is not obliged to avail himself of the privilege conferred; if he does so, he takes it with the condition attached. He cannot complain that his constitutional right has been invaded by virtue of his own voluntary act in availing himself of a conditional privilege tendered him. If he does not like the condition, he need not exercise the option."

It is submitted that no more reasonable limitation could be conceived in a case like this than that a maximum limit be fixed by a skilled and experienced Commission, after a

full hearing and consideration of the facts bearing upon the character and extent of the services performed.

It, therefore, appears that Petitioners are in the position of claimants who under prior existing law had no right at all vested or otherwise. Congress saw fit to give a right which it could entirely withhold but which it saw fit to give with certain reasonable limitations which it was authorized to prescribe. It is submitted that under the circumstances no question of due process or other constitutional limitation is involved.

VI.

No Ground for the Issuance of the Writ as Set Forth in Rule 38 of This Court or Otherwise Is Presented by the Record.

While the claim of Petitioners involves the construction of a Federal Statute, it does not appear that there is any dispute in the authorities as to the proper interpretation or application of the statute involved. The meaning of the statute appears upon its face to be clear, and, in view of the great number of pending reorganization proceedings, it would seem, in the absence of a decision presenting a controversy as to interpretation or application of Section 77(c)(12), that the courts in which the question of allowances has arisen have had no difficulty in construing or applying the law. Our search discloses no conflict in the authorities upon the questions here involved. While it may be said that a question of Federal law is involved, it is submitted that the question is not important in view of the clear language of the statute and its purpose to limit allowances made by the court within the maximum fixed by the Commission. Certainly there is no departure shown from the accepted and usual course of judicial proceedings. While the statute is new, the principles relied upon are old and so

well settled that it cannot be said that a question of general importance is presented. It is further submitted that the decision of the lower courts is so obviously sound that there is no justification for granting the writ for the purpose of further review. Moreover, a case is presented where two courts have decided contrary to the contention of the Petitioners.

Petitioners rely mainly upon the contention that Congress has unlawfully vested judicial power in an administrative body and the further contention that Petitioners have been deprived of rights without due process. A very large portion of what precedes in this brief has been devoted to pointing out the error of Petitioners' contentions as to both of these points, and the rules applying are so well settled as not to admit of doubt.

The contention is made that the decision here is contrary to another decision of the same Circuit Court of Appeals in *In Re Chicago & North Western Ry. Co.*, 121 Fed. (2nd) 791.

We have already pointed out the distinguishing characteristics of that case. The Court there was dealing with an application in behalf of the Debtor for an allowance for an expenditure not yet made and clearly held that the claim there presented did not fall within the class controlled by sub-section (c) (12). The Court in that case made it very clear that in cases falling within that sub-section the District Court was limited by the maximum fixed by the Commission. The appeal from the order denying the Debtor's petition for an order directing the Commission to fix maximum limits was affirmed. That case and this one were decided by the same Court and only a short time intervened between the decisions. The decision in the North Western case was presented to and considered by the Circuit Court of Appeals when it passed upon the petition for rehearing in this case. (R. 158) We submit that the Court properly interpreted its own decisions.

Conclusion.

We believe, therefore, that the case is one where the Interstate Commerce Commission properly exercised a power granted to it by the express terms of the applicable statute; that this statute does not, by its terms or in its application, come within any Constitutional prohibition; that the record fully justifies the finding of the Commission; that both the District Court and the Circuit Court of Appeals were correct in their conclusions and these Respondents respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

A. N. WHITLOCK,
Counsel for Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Respondents.
888 Union Station,
Chicago, Ill.

Dated October 14, 1941.

FILED
OCT 23 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 631

IN THE MATTER OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR.

ISRAEL A. ABRAMS, ET. AL., ETC.,
Petitioners,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET. AL.,
Respondents.

PETITIONERS' REPLY AND MOTION FOR LEAVE TO FILE EXHIBITS.

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A.

Reply.

INACCURATE STATEMENTS IN RESPONDENTS' BRIEF

Respondents call attention (p. 3) to the findings of fact by the District Court as if it dealt with petitioners' objections to the report of the Commission. These findings were limited to that part of the report which dealt with "allowances" and had no ref-

erence to that part of the report which dealt with "*disallowances.*" The findings and order were confined to the allowances, and the objections to the report were disposed of *on the jurisdictional question,* the Court having taken the position (R. 9) that *no matter what the evidence showed* as to the value of petitioners' services, *it was without jurisdiction to go above the zero limit.* A separate order was entered relating to the objections and disallowances (R. 124, 125).

Respondents state (p. 12) that while this record contains only a "narrative statement" the Commission had the "complete" record and because of this it had "first hand information" when it denied petitioners' fees which "two courts have declined to overturn." The impression is gained from such an argument that two courts have passed on the merits of the claim. *The contrary appears from the record.* The District Court denied compensation *on the sole ground that it had no jurisdiction* to go above the zero limit of the Commission no matter what the evidence showed (R. 9). The Circuit Court of Appeals justified the order of the trial court on the ground (R. 153) that "the evidence upon which" the Commission's findings were passed "was not before the District Court". *It is now conceded by the respondents that the Court was mistaken* (p. 18) and they offered an explanation as to what *they think* the Court meant. We will later show that the explanation is fallacious.

MISCONCEPTION OF PETITIONERS' POSITION

It was not petitioners' position that in arriving at a "maximum limit" of the total burden of the debtor's estate in connection with the reorganization, the Commission had no right to *consider* the individual applications for fees and expenses. Petitioners' point on that question was that while the Commission had the right to consider the individual applications in connection with its

total "maximum limit," it had no right to order the individual allowance and particularly the *disallowances* under the guise of fixing a "maximum limit" and that the *disallowances were a judicial determination* which it had no jurisdiction to consider and fix.

FACTUAL AND LEGAL DETERMINATIONS

Respondents cite the *Silver* case (p. 26) on the point that questions of allowances of fees are "mainly questions of fact" and not *legal* questions. The question as to *the amount of the allowances is a factual determination, while the question whether* **any** *allowances should be made is a legal determination* (*Re American Mail Line,* 115 F. (2d) 196, 198 C. C. A. 9).

THE WORD "NOTHING" DOES NOT GO HAND IN HAND WITH THE WORD "MAXIMUM".

The petitioners cited authorities (pp. 22, 24) on the point that the word "nothing" cannot be stretched to "maximum" and that jurisdiction to fix a "maximum limit" does not embrace fixing a limit of "nothing." The only answer in respondents' brief is the bare statement (p. 15) that "there is no merit in the suggestion." This is, of course, *their* "suggestion" and it is obvious that it is without merit.

THE COMPLETE RECORD WAS BEFORE THE DISTRICT COURT

The petition pointed out (pp. 29, 30) that the District Court had the complete record before it and that the Circuit Court of Appeals was *clearly mistaken* in that respect when it based its opinion on the point that the record was not before the District Court. The respondents *concede* (pp. 17, 18) that the record was before the District Court. They offered "a probable explanation" that the Circuit Court *meant* that the Commission "had personal knowledge of the participation by petitioners and their counsel

in the hearings before it." How this explanation may be reconciled with the statement of the Court (R. 155) that "the evidence upon which this finding was made was not before the District Court," is beyond our imagination. Trustees should act impartially and it is not the duty of the respondents, as trustees, to favor one class of creditors or attorneys against the other, and they should not seek to distort statements. What personal knowledge did the Commission have of petitioners' participation and services which was not available to the District Court? We are annexing a motion to this reply for leave to file as Exhibits "I" and "II" the printed record of the hearings before the Commission in which petitioners participated. That record shows that the hearings were had before Commissioner Porter, Director Sweet and Examiner Jamieson. (See Exhibit "II", p. 547.) Division 4, which passed on the fee question (R. 39) consisted of Commissioners Porter, Mahaffie and Miller, so that *two out of the three Commissioners* who originally passed on the fees, *gained their information from the stenographic report which was also presented to the District Court.* The petition for review before the *entire* Commission (R. 81) was denied by the entire Interstate Commerce Commission (R. 103). It appears, therefore, that the Commission had to rely on the same stenographic report which was presented to the District Court, if it did examine the record in connection with such application.

DISTINCTION BETWEEN 77 AND 77B Petitioners distinguished between Section 77 and Section 77B (pp. 31, 32). Respondents' answer (p. 20) cites 77B cases. It is obvious that they are not applicable. The only 77 case which is cited relates to an *interim allowance* where the Court reserved the subject matter to the final hearing and has no remote application to the question presented.

DELEGATION OF JUDICIAL DUTIES In answer to the point that Congress was without power to delegate judicial powers to the administrative body and that the Act should be construed in a way that no such delegation was made, counsel for respondents cite cases on the point that delegation of "quasi-judicial functions" are proper. It is apparent that their answer is not responsive. The lengthy quotation (pp. 21, 22) from the *Sunshine* case throws no light on the question involved, for there "appellant has received all the judicial review to which it was entitled" while here, *the trial court refused to consider the evidence* on the question whether the Commission acted arbitrarily because of its mistaken idea that it was without jurisdiction, and the Circuit Court of Appeals affirmed the decision of the trial court *on its mistaken conception that the evidence was not presented to the District Court.* It is demonstrated, therefore that *petitioners did not have "the judicial review" to which they were entitled.* In the *Sunshine* case the Court said that "the functions of the Court cease when it is ascertained that the findings of the Commission meet the statutory test." In order to ascertain this it was necessary for the trial court, in the first instance, and for the reviewing court, in the second instance, to examine the evidence and to see if the findings have any "basic support" in the evidence (*Morgan* v. *United States,* 298 U. S. 468, 480). This court also said in *Tagg Bros.* v. *United States,* 280 U. S. 420, at page 442:

> "It has been settled in cases arising under the Interstate Commerce Act that *if an order rests upon* an erroneous rule of law * * * or is based upon a finding made without evidence * * * or upon *evidence which clearly does not support it* * * * *the order must be set aside.*" (Italics ours.)

THE QUESTION WHETHER AN ADMINISTRATIVE ORDER WAS CAPRICIOUS CALLS FOR AN EXAMINATION OF THE RECORD.

The fact that two courts found that the services of petitioners were not beneficial to the estate is urged in support of the denial of the petition. We have shown above that the mere findings of the Commission without a statement of the basic facts were insufficient and that neither the District Court nor the Circuit Court of Appeals ever passed on the question whether the evidence supported the Commission's findings.

THE RECORD DOES NOT SUPPORT THE COMMISSION'S FINDING

Under point 3, respondents contend (pp. 16, 17) that the record supports the Commission's finding. They refer to the "narrative statement" and conclude that "it hardly seems possible that upon such a record counsel would urge that the action of the Commission in concluding that the services were of no value to the trust estate was arbitrary action." In the annexed motion we ask leave to file Volumes *I* and *II* of the printed record of the evidence before the Commission as Exhibits *I* and *II* pertaining to the plan which petitioners claim was abandoned because of their efforts (Exhibit *I*, pp. 401-420; Exhibit *II*, pp. 660-661, 667-668, 679, 682, 725 and 809-825). These exhibits show the examination of the witnesses by petitioners' counsel and his argument. This record also shows (p. 629) that at the hearing of June, 1937 counsel for the Institutional Groups urged the adoption of the debtor's plan as "fair and feasible." He said (p. 630): "We are, therefore, *still willing to acquiesce in the plan* as a vehicle of prompt reorganization at this time." This record shows that the only parties who objected to that plan because it was not feasible (due particularly *to the cumulative interest on the general mortgage and cumulative features* in the Fifty-Year Mortgage, which threatened to wipe out the

new common stock to be given in exchange for the Adjustment Mortgage Bonds) was petitioners' counsel (pp. 405-406).* The record also shows (p. 680) that because of these features in the plan the parties who originally claimed that the plan was fair and feasible *conceded that it was not feasible.* In fact, the President of the railroad, in answer on cross-examination by petitioners' counsel (pp. 644, 645), *denied that he ever stated that the plan was feasible."* He said: "I did not say it was feasible." The same parties who sponsored the debtor's plan from August, 1935 to September, 1937 and who disregarded the points urged by the petitioners' counsel at the hearings, later admitted (p. 680) that it was necessayr to change the cumulative features of the 50-year bonds. In the face of this, the statement that the Commission's findings are supported by the record cannot be reconciled with the record.

THE WRIT SHOULD BE ISSUED The reasons stated in the petition for the issuance of a Writ of Certiorari were not obviated by anything which was stated in respondents' brief. They admit that many reorganizations of railroads are now pending; that Section 77 (c) (12) has never been construed by any other courts. The opinion is irreconcilable with the accepted law relating to administration of the Act of Bankruptcy, and the Writ should be issued to settle the practice and to afford relief to the petitioners who were unjustly denied their rights.

Respectfully submitted,

MEYER ABRAMS,
Counsel for Petitioners.

* It was also urged by petitioners' counsel that the entire plan was not feasible due to the fact that it left all existing fixed obligations in the same condition, and the railroad would emerge from this reorganization in a better position than when it emerged from the 1928 reorganization (Exhibit I, pp. 404-405). This was changed by the subsequent plan of the Institutional Groups (Exhibit II, p. 699) and was also changed by the final plan as approved by the Commission.

B.

Motion for Leave to File Exhibits.

Now come Israel A. Abrams, *et al.*, petitioners, by Meyer Abrams, their attorney, and move for leave to file instanter a copy of Volumes I and II of the printed Record filed in the United States Circuit Court of Appeals for the Seventh Circuit in appeal taken by the petitioners from the merits of the plan as Exhibits I and II and nine copies of petitioners brief in said appeal as Exhibit III as per Suggestions in Support of Motion.

MEYER ABRAMS,
Attorney for Petitioners.

Suggestions in Support of Motion.

The Circuit Court of Appeals considered petitioners' brief on the merits in the appeal taken by them from the approval of the plan in connection with the petition for rehearing (R. 158). It considered the brief on the merits because it was contended below that the evidence was not before the District Court. The brief on the merits discussed that evidence (pp. 23, 24, 25) and the brief was filed in order to demonstrate to the court that it was mistaken when it stated in its opinion that the evidence was not before the District Court. These points are discussed in respondents' brief. We stated in the petition (p. 35) that we intended to file the motion for leave to file the exhibits. Respondents' brief makes this motion of the utmost importance in view of their contentions (p. 16) that the "narrative statement" does not entitle the petitioners to the relief, and in view of their further statement (p. 18) that the Commission had first hand information which was not available to the District Court. The follow-

ing pages in Exhibits I and II which are sought to be filed here reflect the services rendered before the Commission by counsel for the petitioners (pp. 401-420, 660-661, 667-668, 679, 682, 725 and 809 to 825). A consideration of the brief which is sought to be filed as Exhibit III is also necessary with reference to the discussion in this petition (pp. 32-35).

For the foregoing reasons, we ask for leave to file the printed record consisting of Volumes I and II dealing with the evidence before the Commission as Exhibits "I" and "II" and for the convenience of the Court we ask leave to file nine copies of the Brief on the Merits as petitioners' Exhibit III.

Respectfully submitted,
MEYER ABRAMS,
Attorney for Petitioners.

Affidavit in Support of Motion.

Meyer Abrams, being first duly sworn, on oath deposes and says that he is the attorney for the petitioners on the application for Writ of Certiorari; that Volumes I and II of the printed Record filed in the United States Circuit Court of Appeals for the Seventh Circuit sought to be filed herein as Exhibits "I" and "II" are true and correct copies of the printed Record now on file in the appeal taken by the petitioners from the approval of the reorganization plan in Case No. 7611; that the Brief sought to be filed as Exhibit "III" is a true and correct copy of the original now on file in said Court.

MEYER ABRAMS.

Subscribed and sworn to before me this 22nd day of October, A. D. 1941.

YETTA GERTLER,
Notary Public.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 631

IN THE MATTER OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR.

ISRAEL A. ABRAMS, ET AL., ETC.,
Petitioners,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET, AL.,
Respondents.

PETITION FOR REHEARING.

In concluding that the "maximum limit" of "nothing" as fixed by the Commission was not subject to review by the District Court, and in concluding that the construction of section 77(c)(12) as vesting the final power in the Commission to deny all compensation does not deprive the petitioner of a vested right the opinion of 7th Circuit states (R. 154):

> "Second, appellants' claim arose after the bankruptcy or reorganization proceedings were instituted. Theirs was not a valid, existing claim at the time of

> bankruptcy. We have no hesitancy in holding that the Congress in enacting this railroad bankruptcy legislation could have provided that no attorneys' fees or expenses should be chargeable against the debtor's estate. *There are no vested rights in favor of those who assist in administering a bankrupt estate, in and to fees for services.* The allowance of such attorneys' fees is based upon the equitable rule that he who renders valuable services should be compensated therefor. But fees not specifically authorized are wholly within the power of the courts to deny. They are also subject to entire disallowance by act of Congress." (Emphasis supplied.)

Since the denial of the petition our attention was called to an appeal taken by a mortgage trustee from a "maximum limit" fixed by the Commission under that section. *The Court there construed that section as applied to a vested right* created by provisions in the mortgage contract (*Re: Chicago and North Western Railway Company*, 35 F. Sup. 230, 258). In the brief filed October 25, 1941, by the mortgage trustee (case No. 7568 in the Seventh Circuit) it is urged that the construction of that section by the District Court would make the section unconstitutional; that *the construction of Section* 77(c)(12) *by the District Court as making the maximum limit binding on the courts as applied to vested rights would make the act unconstitutional.* The District Court concluded that the "maximum limit" of the Commission *could not be disturbed by it even as to vested rights.* Here is *a clear conflict* between the decision of the District Court in construing that section and the opinion in the instant case. Inasmuch as this section was never construed by this Court and it involves the construction of an important question of federal procedure, a rehearing should be granted.

In speaking on behalf of this Court, the Honorable Ex-Chief Justice Hughes stated that a person is entitled to *one appeal as of right*, and as long as such an appeal

is had the question whether or not to allow a writ of certiorari by this court is to be determined not so much by the rights of the parties but by the importance of the question. It is respectfully submitted that *in this case no review was ever had.** The District Court refused to consider the evidence on the question whether or not the decision of the Commission was arbitrary and capricious on the ground that *no matter what the evidence showed the court was powerless, as it could not exceed the zero limit* (R. 9). The Seventh Circuit *affirmed the decision on its mistaken conception that the record containing such evidence was not presented to the District Court* (R. 155).** We have shown in the petition (pp. 29-30) that *the record was presented* to the District Court and that *the Circuit Court made a plain error.* This was *confessed by the respondents* (pp. 17-18) and they tried to explain the matter, but we have shown in our reply (pp. 3-4) that the explanation is unfounded. So, as a matter of fact, *neither court reviewed the evidence to see if the finding of the administrative body has any support in the evidence.* The decision of the Circuit Court being based on a *plain error,* this court will not hesitate to grant the writ (*Dismuke* v. *United States,* 297 U. S. 167, and other

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* The affirmance of a judgment on a plain error as to the status of the record cannot be considered a review in the real meaning of the word.

** The record presents the anamolous situation where a judgment below, based on lack of power to review evidence, is sustained on the ground that the evidence was not presented to the court, and the record demonstrates that the reviewing court was plainly mistaken and the evidence was presented to the trial court. The statement of Mr. Justice Frankfurter in the opinion rendered November 10, 1941 (Re City of Indianapolis Case Nos. 10-13) that "the answer is to be found not in legal learning but in the realities of the record," applies with greater force to the instant case.

authorities cited in *Robertson & Kirkham, on Jurisdiction of Supreme Court,* section 304).

In view of the importance of the question, we ask the Court to reconsider its action in denying the writ, to grant a rehearing, and to allow the issuance of the writ.

Respectfully submitted,

MEYER ABRAMS,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I Meyer Abrams, counsel for the petitioners in the above entitled cause, hereby certify that the Petition for Rehearing is presented in good faith and not for the purposes of delay.

.....
MEYER ABRAMS, *Counsel for Petitioners.*

FILED
DEC 6 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 631

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, Debtor.

ISRAEL A. ABRAMS, et al., etc.,

Petitioners,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS and GEORGE I. HAIGHT, Trustees of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al.,

Respondents.

MOTION FOR LEAVE TO CITE DECISION OF THE NINTH CIRCUIT RENDERED NOVEMBER 28, 1941, AS IN CONFLICT WITH THE DECISION IN THE INSTANT CASE, IN SUPPORT OF THE PENDING PETITION FOR REHEARING.

MEYER ABRAMS,
Attorney for Petitioners.

SHULMAN, SHULMAN AND ABRAMS,
134 North La Salle Street,
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Midwest Law Printing Co.
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Chicago

In The

Supreme Court of the United States

October Term, A. D. 1941.

No. 631

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, Debtor.

ISRAEL A. ABRAMS, et al., etc.,

Petitioners,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS and GEORGE I. HAIGHT, Trustees of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al.,

Respondents.

MOTION.

Now come petitioners by Meyer Abrams, their counsel, and move for leave to cite the annexed opinion rendered by the Ninth Circuit on November 28, 1941, in the matter of the reorganization of the Western Pacific Railroad Company Case No. 9714 in support of the pending Petition for a Rehearing. The case is deemed to be in conflict with the decision in the instant case as per Suggestions in Support of the Motion.

Meyer Abrams,
Counsel for Petitioners.

SUGGESTIONS IN SUPPORT OF MOTION.

The Petition for Certiorari was denied November 10, 1941. A Petition for Rehearing is now pending. Since the filing of the Petition for Rehearing, the Ninth Circuit rendered a decision on November 28, 1941, in the Reorganization Proceedings of the Western Pacific Railroad Company reversing the Interstate Commerce Commission and the District Court. A copy of the Opinion is annexed hereto as an Appendix. The decision is in conflict with the decision in this case in the following respects:

The Seventh Circuit held in the instant case that the finding of the Commission was conclusive on the Court. The Court said (R. 156):

> "In the face of the findings and conclusion of the Commission, which was within its authority, and which was backed by personal knowledge of the extent and value of services rendered, we are convinced that the District Court correctly held it was powerless to allow appellants any sum in this case."

The Ninth Circuit arrived at the opposite conclusion in the annexed Opinion. It said:

> "The District Court's opinion states (34 F. Supp. 501): 'It cannot be gainsaid that the Commission knows all about the debtor, its property, its history, financial and otherwise, its traffic and revenue, and its financial structure. No official body in the country is better qualified by reason of experience, ability and specialized knowledge than is the Commission to find the ultimate facts as to the debtor in relation to any of the matters mentioned.' The statement indicates a possible misconception."

After referring to the section to point out the misconception, the Opinion says:

> "In determining whether a plan of reorganization satisfies the requirements of subsection (o), **the court is not concluded by any determination made by the Commission**, but may, and **must, exercise its own independent judgment**; and this is true whether such determination relates to value **or to some other subject.**"

We ask this Court to examine this Opinion and to compare it with the Petition for Certiorari (pp. 25-30), the Answer of the Respondent to the Petition (p. 18), Petitioners' reply (pp. 1, 6-7), and the Petition for Rehearing (p. 3).

The annexed Opinion is also of great importance on another phase presented by the Petition. We urged (pp. 32-35) that neither the Commission nor the Court were able to say that the services were not beneficial due to the fact that when the Commission decided the fee question, the Court had not yet approved the Plan, and when the Court decided the question, its Order approving the Plan was not yet final, and that we may still succeed on the appeal so that the services may be beneficial.

We filed a Motion here for leave to file a copy of our Brief in connection with the appeal for the approval of the Plan in order to demonstrate this point. This Court did not pass on the Motion when it denied the Writ. This Court may notice that Point I (pp. 12-18) in that Brief *is the point on which the Ninth Circuit reversed the Commission and the District Court.* The Ninth Circuit also held in that Opinion that neither the "Debtor" nor the Mortgage Trustee may be heard on appeal, but only *a party in interest who is affected thereby.* Petitioners are the only parties in interest who may obtain the relief on

the appeal. The granting of the petition will be helpful to the whole estate as they are the only appellants who had the right to be heard on the appeal.

We, therefore, ask the Court to consider the annexed Opinion in connection with the issues presented by the Petition, the Motion for Leave to File Brief and Exhibits on which no order was entered, and the Petition for a Rehearing, to the end that the Writ may be allowed.

Respectfully submitted,

MEYER ABRAMS,
Counsel for Petitioners.

N. B.—Since printing this Motion the writer was informed by telephone by the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit that the appeal in the instant case by the appellants, who are the petitioners herein, from the approval and confirmation of the reorganization plan, was reversed with directions to refer the plan back to the Interstate Commerce Commission. The writer has not yet seen the opinion but he verily believes that the decision was based on the opinion of the Ninth Circuit, annexed hereto at page 5, which opinion was also furnished to the Seventh Circuit.

MEYER ABRAMS,
Attorney for Petitioners.

Chicago, December 4, 1941, 6 p. m.

APPENDIX.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

In the Matter of
The Western Pacific Railroad Company,
Debtor.

THE WESTERN PACIFIC RAILROAD COMPANY,
Appellant,
vs.
RECONSTRUCTION FINANCE CORPORATION, et al.,
Appellees.

IRVING TRUST COMPANY, Trustee,
Appellant,
vs.
RECONSTRUCTION FINANCE CORPORATION, et al.,
Appellees.

THE WESTERN PACIFIC RAILROAD CORPORATION,
Appellant,
vs.
RECONSTRUCTION FINANCE CORPORATION, et al.,
Appellees.

RAILROAD CREDIT CORPORATION,
Appellant,
vs.
RECONSTRUCTION FINANCE CORPORATION, et al.,
Appellees.

A. C. JAMES COMPANY,
Appellant,
vs.
RECONSTRUCTION FINANCE CORPORATION, et al.,
Appellees.

No. 9714
Nov. 28, 1941

Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Before DENMAN, MATHEWS and STEPHENS, Circuit Judges.

MATHEWS, Circuit Judge:

These appeals are from an order of the District Court[1] which, in a proceeding by The Western Pacific Railroad

(1) 34 F. Supp. 493, 505-509.

Company, a railroad corporation (hereafter called the debtor), under §77 of the Bankruptcy Act, 11 U. S. C. A. §205, approved a plan of reorganization which had been approved and certified to the court by the Interstate Commerce Commission.[2] The debtor has outstanding:

1. Trustees' certificates issued pursuant to paragraph (3) of subsection (c) of §77 in the principal sum of $10,000,000. These certificates are owned and held by Reconstruction Finance Corporation.[3]

2. First mortgage 5% bonds dated June 26, 1916, due March 1, 1946, in the principal sum of $49,290,100, with accrued and unpaid interest[4] thereon of $13,143,776—a total of $62,433,876—secured by a mortgage (hereafter called the first mortgage) of which Samuel Armstrong and Crocker First National Bank of San Francisco are trustees.

3. General and refunding mortgage 5% bonds (hereafter called refunding bonds) dated January 1, 1932, due January 1, 1957, in the principal sum of $18,999,500, secured by a mortgage (hereafter called the refunding mortgage) of which Irving Trust Company is trustee.[5] These bonds are pledged to secure payment of the notes hereafter mentioned. They have not been issued for any other purpose.

4. Notes in the principal sum of $2,963,000 with accrued and unpaid interest thereon of $899,870—a total of $3,862,870—secured by the pledge of refunding bonds in the principal sum of $10,750,000 and other collateral. These notes are owned and held by Reconstruction Finance Corporation.

(2) 233 I. C. C. 409, 441-455.

(3) 122 F. 2d 807.

(4) As of January 1, 1939, the effective date of the plan.

(5) Irving Trust Company succeeded The Chase National Bank as trustee on November 13, 1936.

5. Notes in the principal sum of $2,445,610, with accrued and unpaid interest thereon of $146,503[6]—a total of $2,592,113—secured by the pledge of refunding bonds in the principal sum of $4,000,000 and other collateral. These notes are owned and held by Railroad Credit Corporation.

6. Notes in the principal sum of $4,999,800, with accrued and unpaid interest thereon of $1,249,950—a total of $6,249,750—secured by the pledge of refunding bonds in the principal sum of $4,249,500 and other collateral. These notes are owned and held by A. C. James Company.

7. Unsecured indebtedness to The Western Realty Company in the principal sum of $50,000, with accrued and unpaid interest thereon of $11,667—a total of $61,667.

8. Unsecured indebtedness to The Western Pacific Railroad Corporation (hereafter called the holding company) in the principal sum of $5,768,791, with accrued and unpaid interest thereon of $1,980,429—a total of $7,749,220.

9. Six per cent preferred stock of the par value of $28,300,000 (283,000 shares of the par value of $100 each) owned and held by the holding company.

10. Common stock of the par value of $47,500,000 (475,000 shares of the par value of $100 each) owned and held by the holding company.

The plan provides, in effect, that the above mentioned securities and obligations shall be canceled and that, in lieu thereof, the reorganized company[7] shall issue new first mortgage 4% bonds dated January 1, 1939, due Jan-

(6) These are the Commission's figures (233 I. C. C. 452). They differ slightly from those mentioned in the court's opinion (34 F. Supp. 497).

(7) The reorganized company may be the debtor or a new corporation to which all assets of the debtor shall be transferred.

uary 1, 1974, in the principal sum of $10,000,000, secured by a new first mortgage; income mortgage 4½% bonds (hereafter called income bonds) dated January 1, 1939, due January 1, 2014, in the principal sum of $21,219,075, secured by a so-called income mortgage; new 5½ preferred stock of the par value of $31,850,297 (318,502.97 shares of the par value of $100 each); and 319,441 shares of new common stock without par value. These securities are to be distributed as follows:

To Reconstruction Finance Corporation, $10,000,000 of the new first mortgage bonds,[8] $1,185,200 of income bonds, $1,777,800 of new preferred stock and 15,788 shares of new common stock;[9] to the holders of first mortgage bonds now outstanding, $19,716,040 of income bonds, $29,574,060 of new preferred stock and 230,593 shares of new common stock;[10] to Railroad Credit Corporation, $154,111 of income bonds, $241,681 of new preferred stock and 35,425 shares of new common stock;[11] to A. C. James Company, $163,724 of income bonds, $256,756 of new preferred stock and 37,635 shares of new common stock.[12] The Western Realty Company and the holding company are excluded from participation in the reorganization.

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(8) Thus the $10,000,000 of receiver's certificates now held by Reconstruction Finance Corporation would be exchanged for new first mortgage bonds, dollar for dollar.

(9) Thus, for each $1,000 of indebtedness evidenced by notes now held by it, Reconstruction Finance Corporation would receive $306.82 of income bonds, $460.12 of new preferred stock and 4.087 shares of new common stock.

(10) Thus, for each $1,000 of indebtedness evidenced by first mortgage bonds now outstanding, holders thereof would receive $315.79 of income bonds, $473.69 of new preferred stock and 3.693 shares of new common stock.

(11) Thus, for each $1,000 of indebtedness evidenced by notes now held by it, Railroad Credit Corporation would receive $59.45 of income bonds, $93.24 of new preferred stock and 13.666 shares of new common stock.

(12) Thus, for each $1,000 of indebtedness evidenced by notes now held by it, A. C. James Company would receive $26.20 of income bonds, $41.08 of new preferred stock and 6.021 shares of new common stock.

Objections to the plan were filed by the debtor, the refunding mortgage trustee, the holding company, Railroad Credit Corporation, A. C. James Company, The Western Realty Company and a bondholders' committee[13] representing holders of some of the first mortgage bonds now outstanding. The objections were overruled and the plan was approved. The debtor, the refunding mortgage trustee, the holding company, Railroad Credit Corporation and A. C. James Company have appealed.

Neither the debtor nor the refunding mortgage trustee was adversely affected by the plan or by the order approving it. Hence neither of them was entitled to appeal. *King* v. *Buttolph,* 9 Cir., 30 F. 2d 769; *Loomis* v. *Gila County,* 9 Cir., 101 F. 2d 827; *In re Western Pacific R. R. Co.,* 9 Cir., 122 F. 2d 807. Their appeals are therefore dismissed.

The holding company objected to the plan on the ground that it is not fair and equitable,[14] but is unfair and inequitable, in that it excludes the holding company from participation in the reorganization. The objection states that the debtor is not insolvent, but has property of a value greatly in excess of its liabilities. Obviously, if the statement is true, the holding company is entitled to participate in the reorganization, and its exclusion therefrom is unfair and inequitable. Thus, to determine the question raised by the holding company's objection, it was necessary to determine the value of the debtor's property as of the effective date of the plan—January 1, 1939. *Consolidated Rock Products Co.* v. *Du Bois,* 312 U. S. 510, 517-525.

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(13) The committee consists of Frederick H. Ecker, John W. Stedman and Reeve Schley.

(14) Bankruptcy Act, §77 (e) (1), 11 U. S. C. A. §205 (e) (1).

Railroad Credit Corporation objected to the plan on the ground that it is unfair and inequitable, in that it discriminates unfairly in favor of Reconstruction Finance Corporation and the holders of first mortgage bonds now outstanding.[15] A. C. James Company objected to the plan on the ground that it is unfair and inequitable, in that it discriminates unfairly in favor of Reconstruction Finance Corporation, Railroad Credit Corporation and the holders of first mortgage bonds now outstanding.[16]

That Reconstruction Finance Corporation, Railroad Credit Corporation, A. C. James Company and the holders of first mortgage bonds now outstanding should participate in the reorganization is conceded. Fairness requires that their participation should be in proportion to the value of their respective claims. The question raised by the objections of Railroad Credit Corporation and A. C. James Company was whether the plan complies with that requirement. To determine this question, it was necessary to determine, as of the effective date of the plan, the value of (1) each of the claims of Reconstruction Finance Corporation,[17] (2) the claim of Railroad Credit Corporation, (3) the claim of A. C. James Company, (4) the claims of the holders of first mortgage bonds now outstanding, (5) the $10,000,000 of new first mortgage bonds, (6) the $21,219,075 of income bonds, (7) the 318,502.97 shares of new preferred stock and (8) the 319,441 shares of new common stock which the plan provides shall be distributed to said claimants.

To determine the value of the above mentioned claims, it was necessary to determine the value of (1) the debt-

(15) See footnotes 8-11.

(16) See footnotes 8-12.

(17) Reconstruction Finance Corporation has two claims—one as holder of trustees' certificates, one as holder of the debtor's notes.

or's entire property, (2) the property subject to the first mortgage now outstanding, (3) the $18,999,500 of refunding bonds pledged to secure the claims of A. C. James Company, Railroad Credit Corporation and Reconstruction Finance Corporation and (4) the other collateral pledged to secure each of said claims. To determine the value of the refunding bonds, it was necessary to determine the value of (1) the property subject to the refunding mortgage only and (2) the property subject both to the refunding mortgage and to the first mortgage now outstanding. This, of course, necessitated a determination as to which of the debtor's property is, and which is not, subject to each mortgage. *Consolidated Rock Products Co.* v. *Du Bois, supra.*

To determine the value of the new first mortgage bonds, income bonds, new preferred stock and new common stock mentioned above, it was necessary to determine the value of (1) the debtor's entire property, (2) the property which would be subject to the new first mortgage and (3) the property which would be subject to the income mortgage.

Subsection (e) of §77 provides: "If it shall be necessary to determine the value of any property for any purpose under this section, the (Interstate Commerce) Commission shall determine such value and certify the same to the court in its report on the plan." In this case, as has been seen, it was necessary to determine the value of (1) the debtor's entire property, (2) each of the claims of Reconstruction Finance Corporation, (3) the claim of Railroad Credit Corporation, (4) the claim of A. C. James Company, (5) the claims of the holders of first mortgage bonds now outstanding, (6) the $10,000,000 of new first mortgage bonds, (7) the $21,219,075 of income bonds, (8) the 318,502.97 shares of new preferred stock,

(9) the 319,441 shares of new common stock, (10) the property subject to the first mortgage now outstanding, (11) the $18,999,500 of refunding bonds pledged to secure the claims of Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company, (12) the other collateral pledged to secure each of said claims, (13) the property subject to the refunding mortgage only, (14) the property subject to both the refunding mortgage and to the first mortgage now outstanding, (15) the property which would be subject to the new first mortgage and (16) the property which would be subject to the income mortgage. It thus became the duty of the Commission to determine these values and certify them to the court. That duty was not performed.

Lacking the requisite valuation data, the court was in no position to exercise the "informed, independent judgment" which appraisal of the fairness of a plan of reorganization entails. *Consolidated Rock Products Co.* v. *Du Bois, supra.* See, also, *National Surety Co.* v. *Coriell,* 289 U. S. 426, 436; *First National Bank* v. *Flershem,* 290 U. S. 504, 525; *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106, 115. Therefore, instead of approving the plan, the court should have entered an order dismissing the proceeding or, in its discretion and on motion of any party in interest, referring the proceeding back to the Commission for further action.[18]

The District Court's opinion states (34 F. Supp. 501):

> "It cannot be gainsaid that the Commission knows all about the debtor, its property, its history, financial and otherwise, its traffic and revenue, and its

(18) Subsection (e) of § 77 provides: "If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action. * * *"

financial structure. No official body in the country is better qualified by reason of experience, ability and specialized knowledge than is the Commission to find the ultimate facts as to the debtor in relation to any of the matters mentioned."

The statement indicates a possible misconception. Subsection (e) of §77 provides:

"Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge. * * *"

In determining whether a plan of reorganization satisfies the requirements of subsection (e), the court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject. Initially, however, the duty of determining the value of any property for any purpose under §77 rests on the Commission, not on the court.

Order reversed and proceeding remanded with directions to dismiss it or, in the court's discretion and on motion of any party in interest, refer it back to the Commission for further action.

(Endorsed:) Opinion. Filed Nov. 28, 1941. Paul P. O'Brien, Clerk.

Office - Supreme Court, U. S.
FILED
DEC 6 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 631

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, Debtor.

ISRAEL A. ABRAMS, et al., etc.,

Petitioners,

vs.

HENRY A. SCANDRETT, et al.,

Respondents.

MOTION FOR LEAVE TO FILE A CERTIFIED COPY OF THE OPINION OF THE SEVENTH CIRCUIT IN THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC REORGANIZATION IN CONNECTION WITH POINT V OF THE PETITION.

MEYER ABRAMS,
Attorney for Petitioners.

Dated at Chicago, Illinois,
December 5, 1941.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 631

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, Debtor.

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Respondents.

MOTION FOR LEAVE TO FILE A CERTIFIED COPY OF THE OPINION OF THE SEVENTH CIRCUIT IN THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC REORGANIZATION IN CONNECTION WITH POINT V OF THE PETITION.

Now comes ISRAEL A. ABRAMS, et al., Petitioners, and ask leave to file a certified copy of the Opinion of the Seventh Circuit filed on December 4, 1941, to be considered in connection with the Petition for Rehearing and with Point V of the Petition (pp. 31-36).

MEYER ABRAMS,
Counsel for Petitioners.

SUGGESTIONS IN SUPPORT OF MOTION.

Since the filing of the Petition for Rehearing the Seventh Circuit *reversed the entire Reorganization Plan* and remanded it to the Interstate Commerce Commission. This may result in a different Plan. We argued in the Petition (pp. 31-36) that fees for services to attorneys and expenses to parties are allowable under section 77 even if they were not beneficial to the Reorganization Plan, and distinguished section 77 from section 77-B. The decision in the instant case adopted the view that no fees for services may be allowed under section 77 unless they were beneficial to the Reorganization Plan. **Inasmuch as the entire Reorganization Plan has now been reversed, neither the Commission nor the Court could say whether any of the parties are entitled to any compensation until the new Plan will be adopted.**

The record now presents the *anomalous situation* where fees were allowed to attorneys based on the theory that their services were *beneficial* to the Reorganization Plan when the *entire Plan was set aside.*

There is no other appeal pending from the entire Order allowing the fees, except the appeal of these Petitioners. If this Court concludes that under section 77 compensation may be allowed, even where the services did not contribute to the adoption of the Plan, *then the Order on fees* should be reversed only as to the Petitioners. On the other hand, if this Court should conclude that no fees may be allowed when the services did not contribute to the adoption of the Plan, *it follows that the entire Order must be reversed.*

We are submitting together with this Motion a certified copy of the Opinion rendered by the Seventh Circuit.

For the foregoing reasons we ask this Court to consider the Opinion, to grant a rehearing and to allow the Writ of Certiorari.

Respectfully submitted,

MEYER ABRAMS,
Counsel for Petitioners.

Dated at Chicago, Illinois,
December 5, 1941.

Office - Supreme Court, U. S.
FILED
NOV 28 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 631

IN THE MATTER OF

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

DEBTOR.

ISRAEL A. ABRAMS, ET AL., ETC.,

Petitioners,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,

Respondents.

ANSWER TO PETITION FOR REHEARING.

A. N. WHITLOCK,
Counsel for Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Respondents.
888 Union Station,
Chicago, Illinois.

Dated November 26, 1941.

THE BUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 631.

IN THE MATTER OF
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Respondents.

ANSWER TO PETITION FOR REHEARING.

In this case Petition for Certiorari was denied by this Court on November 10, 1941. Thereafter, Petitioners filed herein a Petition for Rehearing. In answer to said Petition for Rehearing Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Respondents herein, respectfully submit that said Petition presents no matter of substance which was not presented to the Court by the Petition for Certiorari and the brief of Respondents in opposition thereto, cites no authorities which are inconsistent with the conclusions

heretofore reached in this case, presents no new or additional ground for granting certiorari and is wholly without merit. Their discussion of the questions presented, therefore, will be very brief.

The Petitioners seize upon the phrase "vested rights" and call attention to that portion of the opinion of the Court below in which that phrase is used. The Court makes it clear in that portion of the opinion that the right to allowances payable from the estate in bankruptcy proceedings is statutory; that Congress could withhold such right entirely or could grant it subject to maximum limits fixed by the Commission. In the absence of statute, no such right exists, vested or otherwise. Admittedly, Petitioners in this case must rely solely upon their rights under the statute. They now urge that in the pending North Western appeal, not yet heard, (case below *Re Chicago & North Western Railway Company*, 35 Fed. Supp. 230, 258) one of the appellants is a Mortgage Trustee and in its brief it claims that its right to an allowance in excess of the maximum fixed by the Commission exists by virtue of the provisions of the mortgage there involved and complains of the holding of the District Court that in such case the limitation imposed by Section 77 (c) (12) applies to allowances for services and expenses in connection with the proceeding and plan. If Counsel for the Petitioners were representing the Mortgage Trustee, appellant in that case, it would be understandable that he might urge that the provision in the mortgage for fees and expenses strengthened his position, but we are at a loss to understand how the possibility of such a contention lends any support to Petitioners in this case. The North Western decision by the District Court was brought to the attention of this Court in our brief in opposition to the Petition for Writ of Certiorari (p. 13). That decision is in every way consistent with the decision in this case. In both cases the Court clearly holds that such allowances are governed by

Section 77 (c) (12). In the North Western case the District Court, in discussing the claim of this same Mortgage Trustee, said:

> "The Court is satisfied that it has no power to make allowances for compensation for services compensable under the statute aforesaid in excess of the maximum allowances fixed by the Interstate Commerce Commission, whether such excess be payable out of the mortgaged property only or from other sources. Whether, if a mortgage trustee or its counsel earned compensation under the terms of the mortgage for service which was not compensable under the statute aforesaid, the Court would have power to make an allowance payable from some source, is a question which it is unnecessary to decide on the present record." *In re Chicago & North Western Railway Company*, 35 Fed. Supp. 230, 258.

We are at a loss to understand why Petitioners cite the case of *Dismuke* v. *United States*, 297 U. S. 167. Insofar as that case is pertinent to the controversy here involved, its holding is clearly contrary to Petitioners' contention. The Court was there dealing with a claim against the United States and points out that the United States may withhold all remedy or may provide an administrative remedy and make it exclusive. The case, therefore, presents a clear analogy to this case where Congress, having the right to withhold any allowance, may provide for allowances within maximum limits fixed by the Interstate Commerce Commission.

Counsel for Petitioners again suggests that the action of the Commission was arbitrary. The Commission's findings were made upon a full record, the material portions of which were brought to the Circuit Court of Appeals by the Petitioners here, and the Circuit Court of Appeals, in its opinion, said:

> "The Commission did not find that no services were rendered; it found that they were of no value to the estate. If the services were of no value, it cannot be

said that the refusal of allowance to appellants was arbitrary or capricious." *Abrams* v. *Scandrett*, 121 Fed. (2nd) 371, 376.

Counsel for the Petitioners insists upon ignoring both the rule of the statute that allowances must be within maximum limits fixed by the Commission and the finding made by the Commission, clearly supported by the evidence, that Petitioners rendered no service of value to the estate. The Courts have had no difficulty in interpreting the statute. Its meaning is clear and no diversity of opinion upon the part of the Courts with reference thereto exists. All questions involved were fully presented in the briefs heretofore filed by the parties and there would seem to be no justification for burdening the Court with further discussion.

Respondents respectfully submit that the Petition for Rehearing should be denied.

Respectfully submitted,

A. N. WHITLOCK,
Counsel for Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Respondents.
888 Union Station,
Chicago, Illinois.

Dated November 26, 1941.